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91-713

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

A/S DAMPSKIBSSELSKABET TORM,

Petitioner,

—against—

BEAUMONT OIL LTD. and BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in creating an exception for "secured parties" to the long established transportation and maritime law principle that a consignee on a bill of lading is responsible for transportation charges?

2. Did the Court of Appeals disregard long established transportation and maritime law principles and precedent in holding that a "secured party" was not liable for transportation charges, despite the fact that title to the goods was held by the "secured party", and the "secured party" exercised dominion and control over the cargo?

LIST OF PARTIES

The parties to this proceeding are A/S Dampskibsselskabet Torm, Petitioner, and Banque Paribas (Suisse) S.A., Geneva, a Swiss banking corporation, Respondent. An additional named party is Beaumont Oil Ltd., a Bermuda corporation, however, this corporation has never appeared in this case. Pursuant to Supreme Court Rule 29.1, Petitioner's subsidiaries are set out at page 59a of the Appendix.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is reported at 927 F.2d 713, is reprinted at pages 1-22a of the Appendix. The opinion of the United States District Court for the Southern District of New York (Broderick, J.), which is reported at 1990 A.M.C. 2232, is reprinted at pages 23-26a of the Appendix.

JURISDICTION

Based on federal admiralty and maritime jurisdiction, 28 U.S.C. § 1333, Petitioner commenced this action on July 18, 1986, in the United States District Court for the District of Oregon, seeking recovery of transportation charges. The case was subsequently transferred to the United States District Court for the Southern District of New York. On March 30, 1990, the district court granted Petitioner's motion for summary judgment. On August 10, 1990, the district court denied Respondent's motion for an order amending and adding to the court's findings of fact and memorandum, or, alternatively, for a new trial. Final judgment was entered on August 15, 1990.

On Respondent's appeal, the United States Court of Appeals for the Second Circuit on March 11, 1991 entered a judgment and opinion reversing the district court's judgment (Appendix pp. 1-22a). Jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. § 1291.

Petitioner's subsequent petition for rehearing (including a suggestion that the action be reheard in banc) was denied by the Court of Appeals on April 19, 1991 (Appendix pp. 27-28a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition involves U.C.C. § 9-504 (1981). The pertinent text of this provision is reprinted at pages 56-58a of the Appendix.

STATEMENT OF THE CASE

Petitioner A/S Dampskibsselskabet Torm (hereinafter "Torm" or "Petitioner") commenced this admiralty action against Beaumont Oil Ltd. (hereinafter "Beaumont")[1] and Banque Paribas (Suisse) S.A., Geneva (hereinafter "Paribas" or "Respondent") to recover freight and other related transportation charges arising from the shipment of 241,874 U.S. barrels of unleaded gasoline. That cargo was loaded on board Petitioner's vessel, M/T TORM ROTNA, at El Pallito, Venezuela between May 24-26, 1986 and discharged at Portland, Oregon between June 18-20, 1986.

In order to pay for the cargo, Beaumont previously had requested that Paribas issue a letter of credit in favor of the

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1 There were actually two "Beaumont" corporations involved in the underlying transaction: Beaumont Oil Ltd., a Bermuda corporation and, an affiliated Texas corporation, Beaumont Oil, Inc. Although Beaumont Oil Ltd. was a named party to this action, it never appeared. As stated by the district court:

> [Beaumont Oil Ltd.]'s affiliate, Beaumont Oil, Inc. was placed in involuntary bankruptcy in September, 1986. The exact relationship between Beaumont Oil Inc. and Beaumont Oil Ltd. is unclear. However, both Beaumont Oil Inc. and Beaumont Oil Ltd. did maintain accounts and enter into credit and security agreements with [Paribas]. As a result, [Paribas] held valid security interests in all of Beaumont Ltd.'s and Beaumont Oil Inc.'s assets.

1990 A.M.C. at 2233 n. 1 (Appendix p. 24a). Therefore, as did the Court of Appeals, Petitioner collectively refers to both companies by the term "Beaumont." 927 F.2d at 715 (Appendix p. 4a).

seller of the gasoline. Pursuant to this request, Paribas opened a letter of credit on May 23, 1986 in the amount of $5,171,000. In the underlying agreement governing the letter of credit Beaumont granted Paribas a security interest in the cargo, and recognized Paribas' ownership and unqualified right to possession and disposal of this collateral. Furthermore, as an express condition of drawing on the letter of credit, the seller was required to present bills of lading to Paribas signed to the order of Paribas, with Beaumont as the notify party.[2]

Beaumont arranged for the transport of the cargo by entering into a voyage charter party with Torm on May 22, 1986. The freight payable to Torm was to be calculated on the basis of the voyage actually performed. After the cargo was loaded in Venezuela, the TORM ROTNA's Master signed the required bills of lading indicating Paribas as the consignee and Beaumont Oil, Inc. as the notify party. At the beginning of the voyage, the cargo had not been re-sold, and in fact during the voyage the market price of gasoline declined. Based on market considerations, the TORM ROTNA was diverted from its original destination of New York to the United States West Coast, in hopes of obtaining a better price for the cargo. That re-routing was allowed by the terms of the charter party.

Thereafter Beaumont informed Paribas as to the identity of the shore storage facility to which the cargo was to be discharged in Portland, Oregon. Paribas, based on its own commercial information, at first refused to permit discharge at that facility. After further discussion and consideration, however, Paribas authorized Beaumont to discharge the cargo at the Portland facility. The warehouse receipts at the storage

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2 On the typical bill of lading form, besides a blank for the name of the consignee, there are also typically blanks encaptioned "address arrival notice to" and "also notify." *See* C. Powers, A Practical Guide to Bills of Lading (1966). The bill of lading in this case read, concerning the cargo: "[T]o be delivered at the port of: New York Harbor, U.S.A. . . . unto: to the order of BANQUE PARIBAS (Suisse) S.A. Geneva Notify Beaumont Oil, Inc. Houston, Texas."

facility were made out to Paribas' order, as Paribas had demanded. At the time the discharge was directed the TORM ROTNA's Master refused to discharge the cargo, as the original bills of lading had not been presented to him. Thus, in order to induce the Master to allow unloading to begin, both Beaumont and Paribas provided Torm with a letter of indemnity which served to hold Torm harmless from all liability for discharging the cargo without having the bills of lading in its possession. Thereafter, the cargo was discharged to the storage facility. Prior to the issuance of the warehouse receipts, Paribus had direct communications with the warehouse.

Once the cargo was in the storage facility, Paribas approved its release to third-party purchasers. Paribas then received the purchase price of the various parcels of gasoline and applied all proceeds from those sales to reduce Beaumont's debt to Paribas. Significantly, Paribas specifically allowed Beaumont to regrade a parcel of gasoline from unleaded to "leaded." The gasoline was sold in various parcels, and on every occasion, the storage facility was admonished directly by Paribas to return any amount not released pending its further instructions. The total sale receipts for the gasoline were applied by Paribas to Beaumont's debt, however, the amount received was less than the letter of credit amount. Although Beaumont informed Paribas as early as June 24, 1986 that at least $586,207.22 should be remitted to Torm for the carriage of the cargo, Torm was never paid freight or any other expense by either Beaumont or Paribas.

Petitioner and Respondent each moved for summary judgment in 1988, the parties stipulating that the court could decide the case based on the parties' submissions. After hearing oral argument, the district court issued its order, which is reported at 1990 A.M.C. 2232 (reprinted at pp. 23-26a of the Appendix). The court found that Paribas had not entered into an express agreement with Torm for the shipment of the goods, nor had Paribas accepted the cargo. The court did find, however, that through its actions Paribas had exerted dominion and control over the oil and that a promise to pay

for its transport could be implied. The court based its holding on six specific factual findings:

> First, Paribas required that it be named as the consignee on the bills of lading.
>
> Second, by entering into the letter of indemnity with Beaumont for the benefit of Torm, Paribas manifested an active role in the transaction.
>
> Third, Paribas played an essential role in the selection of the storage facility and it was Paribas not Beaumont which exercised control over the oil at the storage facility by directly communicating with its personnel.
>
> Fourth, Paribas specifically authorized each sale from the stored oil and received the proceeds.
>
> Fifth, Paribas authorized the storage facility's regrade of part of the stored oil.
>
> Sixth, Paribas clearly benefitted from Torm's services.

1990 A.M.C. at 2233-35 (Appendix pp. 24-26a).

In reversing the district court, reported at 927 F.2d 713 and reprinted at pp. 1-22a of the Appendix, the Court of Appeals held that the acts of Paribas were merely those of a secured party and not those of a presumptive owner. Therefore the court found that the Bank was not liable for payment of the freight charges. The Court of Appeals concluded that absent an acceptance of the goods or an express agreement, liability for freight may not be imposed on a secured creditor who did not act as owner of the goods. Moreover, the Court of Appeals rejected Torm's cross-appeal. Torm had asserted that the district court erred in holding that Paribas had neither entered into an agreement to pay the transportation costs nor accepted delivery of the goods. The apparent foundation for the decision of the Court of Appeals was that Paribas did not "physically" accept the cargo. Absent possession the court held that Paribas could not be held liable for freight charges, regardless of whatever actions it took concerning the cargo.

The Court of Appeals disregarded well-settled precedent from both its own and other Circuits. By adopting an overly-solicitous attitude towards Paribas, the court below erected an impenetrable bulwark of protection from liability for transportation costs for banks and other secured parties who are knowing consignees of goods. The decision ignored long established transportation and maritime law principles and precedents, including the Court's own, which have held that a consignee is liable for transportation charges, despite the fact that the consignee is acting for another, or is named as consignee for security purposes. The decision has destroyed the established and carefully-crafted rules which have guided courts, both federal and state, in determinations of presumptive ownership. A detailed, yet balanced, factual inquiry has been replaced by a mechanical test which is commercially unrealistic.

The Court of Appeals explicitly relied upon the reasoning set forth by the *amicus curiae* below, the American Banking Association. In that brief, the *amicus* described and defended the actions of Paribas as those of any commercial bank acting prudently in regard to its collateral. Indeed, the *amicus* argued, *without reference to any authority*, that the district court's "imposition of shipping costs on a mere secured creditor would wreak havoc in the international banking community." 927 F.2d at 716 (Appendix p. 7a). In adopting verbatim that unsubstantiated—and partisan—line of reasoning, the Court of Appeals made the interests of all secured parties, such as Paribas, paramount to those of all carriers in international commerce, such as Torm. That holding, which grants *de facto* immunity to secured parties, should not be permitted by this Court.

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT OF APPEALS IGNORED LONG ESTABLISHED TRANSPORTATION AND MARITIME LAW PRINCIPLES AND PRECEDENTS, INCLUDING ITS OWN, IN CREATING AN EXCEPTION FOR A "SECURED PARTY" TO THE RULE THAT A CONSIGNEE ON A BILL OF LADING IS LIABLE FOR TRANSPORTATION CHARGES.

The Court of Appeals considered as non-dispositive the fact that Paribas—at its own request—was named as a consignee on the bills of lading. In the view of the Court of Appeals, "a bank being named on the bill of lading does not mean that the bank is the owner of the goods." 927 F.2d at 720 (Appendix p. 16a). That holding is contrary to well-founded legal principles and long established precedent.

In *Vane v. A.M. Wood & Co.*, 231 F. 353 (S.D.N.Y. 1916), Judge Learned Hand stated the rule concerning a consignee's obligation with respect to transportation charges:

> It has been held for many years that a consignee, who receives goods under a bill of lading which contains an agreement to pay freight, is personally responsible for the freight. The theory is that the acceptance of the goods under the bill of lading is evidence of an agreement by the consignee to be bound in accordance with its terms. Cock v. Taylor, 13 East, 399; Sanders v. Vanzeller, 4 Q.B. 206; Moeller v. Young, 25 L.J.Q.B. at page 96. The American cases accord, although the reason for the rule is not always stated. Certain Logs of Mahogany, 2 Sumner, 589, Fed. Cas. No. 2,559; Phila. & Reading R. R. v. Barnard, 19 Fed. Cas. 478; Shaw v. Thompson, Fed. Cas. No. 12,726. The rule has, however, been stated as an absolute legal liability. Union Pac. R.R. Co. v. American Smelting & Refining Co., 202 Fed. 720, 121 C.C.A. 182. And this apparently is

> the effect of the English Bills of Lading Act, 1855 (18 & 19 Vict. c. 111, § 1).

Id. at 354.

In *Transmarine Corp. v. Delaware and Hudson Co.*, 127 Misc. 812, 216 N.Y.S. 623 (N.Y. Sup. Ct. 1926), the court unequivocally concluded that an ocean carrier's claim against a consignee for unpaid freight was ripe for summary judgment:

> It is settled that the receipt and acceptance of the goods by the consignee under a bill of lading providing for payment of freight charges on delivery implies a promise on the part of the consignee to pay therefor (*Pennsylvania Railroad Co. v. Titus*, 216 N.Y. 17; New York Central Railroad v. Ross Lumber Co., 234 id. 261); neither would any agreement between the consignor and the consignee of which plaintiff had no knowledge be binding on the plaintiff, nor would the latter be bound to inform the consignee that the freight was not paid for by the consignor.

Id. 127 Misc. at 813.

The law in New York and under the general maritime law remained unchanged until the decision by the Court of Appeals.

In the present matter the district court found the bill of lading contained an express undertaking to pay freight. More significantly, Paribas required that it be named as the consignee. The Court of Appeals' conclusion that Paribas did not enter into an agreement to pay transportation costs is not supported by the record and is in error as a matter of fact and law. *Vane*, 231 F. at 354; *Transmarine*, 127 Misc. at 813. The Court of Appeals sought to dispose of this issue by exclusive reliance on the charter party, however, that reliance totally eviscerates the pivotal role of the bill of lading in international commerce.

The role of the bill of lading in commercial transactions can hardly be understated:

> A bill of lading is a document of dignity, and courts should do everything in their power to preserve its integrity in international trade for there, especially, confidence is of the essence.

The Carso, 43 F.2d 736, 744 (S.D.N.Y. 1930), *modified*, 53 F.2d 374 (2d Cir.), *cert. denied*, 284 U.S. 679 (1931). By ignoring the simple fact that Paribas was the consignee on the bill of lading, the Court of Appeals has undermined the confidence in bills of lading which is vital to international commerce.

Critical to the decision by the Court of Appeals is the holding—not supported by the record—that Paribas had not "accepted" the cargo. A full review of the record, particularly that portion which deals with the discharge of the cargo to, and subsequent sale from, the storage facility establishes that Paribas did accept delivery of the cargo. Simply stated, the demands which Paribas made prior to permitting the discharge to the storage facility and the conditions which Paribas placed on that facility resulted in Paribas exercising exclusive control of the cargo. As such, the finding is inescapable that Paribas did accept delivery of the cargo and is liable for the transportation charges of the TORM ROTNA. *Vane*, 231 F. at 354; *Transmarine*, 127 Misc. at 813. That conclusion is further buttressed when one considers that Beaumont passed legal title in the TORM ROTNA's cargo to Paribas. The agreement between Beaumont and Paribas stated that in addition to granting Paribas a "security interest", Beaumont "recognize[s] and admit[s] *your* [Paribas] *ownership* and unqualified right to the possession and disposal of all property shipped . . . ." (Appendix p. 31a) (emphasis added). Therefore, when Paribas dealt with the storage facility it was acting as the owner of the cargo, and, as such, is properly liable for the transportation charges of the TORM ROTNA.

On the issue of whether Paribas "accepted" the cargo, the Court of Appeals attempted to distinguish its own earlier holding in *Dare v. New York Cent. R.R.*, 20 F.2d 379 (2d Cir. 1927). In that case, the defendants attempted to avoid the principle that a consignee or endorsee of a bill of lading is responsible for transportation charges by arguing that they held the bills of lading for "security purposes" only. The Court of Appeals summarily rejected that position:

> It is contended that the cases above mentioned are distinguishable, because in the case at bar the defendants were not consignees nor owners, but only pledgees for security. We think this difference immaterial. So far as plaintiff knew, the defendants were owners of the shipments. They held order bills of lading duly endorsed by the consignees named therein.

Id. at 380. While acknowledging *Dare*, the Court of Appeals either *sub silentio* overruled the case or limited its future application so severely that the continued vitality of the case is illusory. In essence, the Panel restricted *Dare* to instances where a consignee takes physical possession of the cargo. Although delivery of the cargo was emphasized by the Court of Appeals, it is unclear from the decision in *Dare* whether the consignee actually accepted such delivery.[3] Actual delivery is not, however, critical to the holding in *Dare*. The essential fact was that the secured party was named as the consignee and held the bill of lading.

The Court of Appeals' analysis and decision failed to recognize that crucial fact, *i.e.*, physical acceptance of the goods was unnecessary in view of Paribas' status as consignee on

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3 Petitioner respectfully submits that delivery of the cargo to a secured party is irrelevant. In reality a secured lender will not have facilities to store cargo and will, as here, utilize an independent facility or warehouse of a third party, such as the facility in Portland. There is no principled distinction between *Dare* and the instant matter, and any distinction based on physical possession is specious and unsupported by the *Dare* decision.

the bill of lading and its possession of the bill of lading. As stated by Justice Shiras:

> The exigencies of trade have called a class of instruments into being which are substantially acknowledgements by public or private agents that they have received merchandise, and from whom or on whose account; and usage has made the possession of such documents equivalent to the possession of the property itself. Among them the most notable is the bill of lading, in respect to which, and replying to the question whether at law the property of goods at sea passes by indorsement of a bill of lading, Buller, J., said, in his opinion in *Lickbarrow v. Mason*: 'Every author which can be adduced, from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee.' Smith's Leading Cases, vol. part 11, 7th Am. ed. under the head of *Lickbarrow v. Mason*.

The Carlos F. Roses, 177 U.S. 655, 689 (1900) (Shiras, J., dissenting). Cases decided by this Court have specifically affirmed that principle that a "secured party" holding the bill of lading is the *owner* of the goods, even where the place of the delivery is at a great distance from the location of the secured party. For example, in *Dows v. National Exch. Bank*, 91 U.S. 618 (1875), a bank in Wisconsin was the holder of the bill of lading and consignee of a shipment of wheat from Wisconsin to New York; the bank never had "physical" possession of the cargo. This Court held that the bank had a right to sue for the cargo's conversion:

> When, therefore, the drafts against the wheat were discounted by [the] bank, and the bills of lading were handed over with the drafts as security, the bank became the owner of the wheat, and had a complete right to maintain it until payment.

Id. at 632. *See also National Bank v. City Bank*, 103 U.S. 668, 670 (1881) (by holding bills of lading local bank had full

right of possession of cargo shipped to another state). Thus, just as physical acceptance of the cargo would have been unnecessary for Paribas to maintain an action for cargo loss or conversion, physical acceptance similarly is unnecessary to hold Paribas liable for transportation costs as any other consignee would be so held. By deciding otherwise, the Court of Appeals has directly challenged principles enunciated by this Court in the last century.

In summary, the Court of Appeals has made an exception to the settled rule of consignee liability. Henceforth if the consignee on a maritime bill of lading is a bank or other secured party then the consignee will not be responsible for freight charges. Nothing in the record justifies that deviation from the settled and accepted course of dealing in the maritime industry.

POINT II

THE COURT OF APPEALS REFUSED TO APPLY THE TEST FOR "DOMINION AND CONTROL" OF CARGO IN ACCORDANCE WITH ESTABLISHED PRECEDENT OF OTHER CIRCUITS.

A central function of the certiorari jurisdiction of the Court is to resolve conflicts among the Circuits. *Bailey v. Weinberger*, 419 U.S. 953 (1974) (White, J., dissenting); U.S. Sup. Ct. R. 10.1. In the past this Court has exercised its discretion and issued a writ of certiorari to resolve "an apparent conflict" between the Circuit Courts of Appeals. *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 559 (1968). This discretion to resolve conflicts has also been specifically invoked in maritime cases. *Waldron v. Moore-McCormack Lines*, 386 U.S. 724, 724 n.2 (1967). Petitioner submits that the decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *States Marine Int'l Inc. v. Seattle-First Nat'l Bank*, 524 F.2d 245 (9th Cir. 1975).

After ignoring the significance of Paribas' status as a consignee, the court below stated its recognition of the well-

established rule that a consignee who exercises dominion and control over a cargo may be liable for transportation charges. However, in finding for Paribas, the Court of Appeals has created an exception which eliminates that rule. That exception, however, is inconsistent with *States Marine* and decisions of other federal and state courts, including a prior decision of the Second Circuit.

As recognized by the Court of Appeals below, *States Marine* is the leading decision in this area. In that case it was stated:

> The most obvious indication of a consignee's implied agreement to pay for freight charges occurs when he accepts the goods himself, indicating that they are his own and not the shipper's. The Supreme Court has said, 'The weight of authority seems to be that the consignee is *prima facie* liable for the payment of the freight charges when he accepts the goods from the carrier.' *Pittsburgh C.C. & St. Louis R.R. v. Fink*, 250 U.S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151 (1919). Even where there is no actual acceptance of the goods by the named consignee, presumptive ownership may arise from his exercise of dominion and control over the shipment.

Id. at 248.

Other courts have endorsed the *States Marine* "dominion and control" principle in finding a consignee under a bill of lading responsible for the payment of freight. *See Ivaran Lines v. Sutex Paper and Cellulose Corp.*, 1987 A.M.C. 690 (S.D. Fla. 1985); *Waterman S.S. Corp. v. 350 Bundles of Hardboard*, 603 F.Supp. 490 (D. Mass. 1984).

In its opinion, the Court of Appeals did not explicitly contest the *States Marine* principle *per se* but instead created another exception for Paribas (and by extension other banks). In doing so, the Court of Appeals accepted the arguments of Paribas (and the *amicus*) that a bank should be absolved of the responsibilities a consignee has in ordinary maritime commerce as regards the payment of freight by vir-

tue of its status as a "secured creditor." As discussed in Point I, *supra*, pp. 9-12, the same Court of Appeal previously had rejected the creation of any such exception in *Dare v. New York Cent. R.R.*, 20 F.2d 379 (2d. Cir. 1927).

Furthermore, in arriving at its result, the Court of Appeals misapprehended the crucial distinction between *States Marine* and the present matter, i.e., the bank in *States Marine* did not know that it appeared as a consignee on a bill of lading and it never received the bills of lading. As the court noted:

> It is undisputed that the Bank had no knowledge that it was named by Royal as consignee in the bills of lading. It did not receive copies of the bills. Royal's unilateral act could not in itself impose liability on the Bank.

States Marine, 524 F.2d at 248-49.

Unlike the Bank in *States Marine*, Paribas *required* that the seller of the cargo name it as a consignee and forward the bills of lading to Paribas. That significant distinction was noted by the court in *Consolidated Rail Corp. v. Hollamore Motor Transp., Inc.*, 394 Mass. 56, 473 N.E.2d 1137, *cert. denied*, 474 U.S. 918 (1985). *Consolidated Rail* recognized that liability was not imposed on the bank in *States Marine* because the bank was named as a consignee "without its knowledge" and dismissed the case before it precisely because the defendant had no knowledge that it was named as the consignee on the bills of lading. 473 N.E.2d at 1138.

In addition, the bank in *States Marine* did not select the warehouse to which the cargo carried under the bill of lading was discharged and stored, nor did that bank know when the cargo arrived:

> There was no prior agreement between the Bank and the warehouses that they would accept the goods for the Bank; nor did the Bank know the deliveries when they were made. When the goods arrived, notices were sent to Royal pursuant to instructions in the bills of lading, and no notice was sent to the Bank.

States Marine, 524 F.2d at 249.

In stark contrast is the present matter where Paribas was intimately and continually involved in the selection of the storage facility as its warehouse, was well aware when the TORM ROTNA and its cargo of gasoline had arrived in Portland, and took pains to ensure that it would control the disposition of the gasoline and receive the sale proceeds thereof.

In sum, the bank in *States Marine* never made an express or implied contract to pay freight due under a bill of lading since, unlike Paribas, it neither requested nor agreed to appear as consignee on the bill of lading. More importantly, the *States Marine* bank was ignorant of the details concerning the ocean transportation and the discharge of the cargo. As has been stated in detail, Paribas was involved intimately with all aspects of the ocean transportation provided by the TORM ROTNA.

Finally, the analysis undertaken by the Ninth Circuit in *States Marine* in and of itself is in conflict with the position adopted by the Court of Appeals in this matter. In *States Marine*, there was no dispute that the bank was a secured party which appeared on the bill of lading as the consignee. If the mere fact that the consignee was acting as a secured party absolved that consignee from the obligations of a consignee under maritime law, the inquiry as to the bank's knowledge of its consignee status and the ocean voyage would have been unnecessary. *States Marine*, therefore, stands for the principle that a secured party is liable in the same manner as any other consignee if it knowingly appeared as the consignee and held the bills of lading.

Citing no relevant authority, the Court of Appeals portrays the district court's decision as "unprecedented" and contrary to legal principles which have prevailed for seventy years. However, even a cursory review of relevant precedent reveals that liability routinely has been placed on parties in circumstances far less compelling than those present in this case, despite the secured status of those parties. For example, *Producer's Cotton Oil Co. v. Amstar Corp.*, 197 Cal. App. 3d

638, 242 Cal. Rptr. 914 (Cal. Ct. App. 1988), concerned a dispute between a secured party and another party who had provided funds used for the production of crops. The secured part based its litigation on the theory that its secured position entitled it to all the proceeds from the sale of the crops, notwithstanding the fact that the other party had advanced significant funds for the production of the crops, while inadvertently failing to protect its own security interest. The court concluded that to allow the secured party to recover would violate the equitable concept of unjust enrichment. The secured party had argued that if it did not prevail, the principle underlying the U.C.C., *i.e.*, commercial stability, would be undermined. Conversely, the defendant asserted that general principles of law and equity are not defeated by the U.C.C. The court stated:

> We agree with the position of [defendant] and hold that when a party possessing a security interest in a crop and its proceeds has knowledge of and acquiesces in expenditures made which are *necessary* to the development of the crop, and ultimately benefits from the expenditures, a party who, through mistake, pays such costs without first obtaining subordination is entitled to recover.

Id., 242 Cal. Rptr. at 927. *See also Ed Duagan, Inc. v. Ninth Dist. Prod. Credit Assoc.*, 795 P.2d 1347 (Colo. Ct. App. 1990), *cert. granted*, No. 90SC129 (August 27, 1990).

As in *Producer's Cotton*, in this matter the district court found as a matter of fact that Paribas clearly benefitted from Torm's services in carrying the gasoline aboard its vessel. While such a finding is not essential for the imposition of liability for transportation charges on a consignee, it is further evidence in support of the propriety of the court's ruling that Paribas must pay the transportation costs incurred by the TORM ROTNA[4]. *Producer's Cotton* also illustrates that

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4 Before the Court of Appeals, Paribas attempted to challenge that finding by arguing that there is no evidence to demonstrate that the cargo was of greater value in Oregon than Venezuela. That issue is

under appropriate circumstances there is nothing "unprecedented" about imposing liability on a secured party under circumstances such as those found by the district court.

As was the case with the defendants in *Dare*, 20 F. 2d at 380, Paribas knowingly, intentionally, and for its own purposes had itself named as a consignee in the TORM ROTNA bills of lading and took possession of those bills of lading. Nonetheless, the Court of Appeals has created a "secured party exception" whose sole purpose is to allow Paribas to escape from the obligations long-established precedent imposes on a consignee. By accepting the bank's argument that its *subjective* intent was to appear as a consignee and hold the bills of lading for "security purposes only," the court has removed the only objective proof and has created an unjustified and impenetrable barrier to suit.

Nor is the analysis of the Court of Appeals in accordance with fundamental principles of contract interpretation:

> In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different than from that expressed.

Calderon v. Atlas S.S. Co., 170 U.S. 272, 280 (1898). As expressed more colorfully by Judge Learned Hand:

> The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words . . .

Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976, 984 (S.D.N.Y. 1917) (L. Hand, J.). *See also Lawyers Title*

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irrelevant to the present dispute. Once Paribas elected to become involved in the transportation of the gasoline from Venezuela to the United States, and once the TORM ROTNA performed those services, Paribas had received the benefit of those transportation services. Whether in retrospect it would have been better to have left the gasoline in Venezuela is an inquiry which cannot change the fact that Torm provided the transportation services.

Ins. Corp. v. United States Fidelity & Guar. Co., 122 F.R.D. 567, 569 (N.D. Cal. 1988) (in ascertaining the intent of the parties to a contract, court looks to objective, not subjective, criteria). The Court of Appeals ignored the readily available documents and objective criteria in this case, *i.e.*, the fact that Paribas was the named consignee. Instead, the court below adopted the argument that the subjective intent of the secured party should control—a result with far-reaching and negative implications for international commerce.

Although the opinion of the Court of Appeals below cites *States Marine* as controlling authority, *States Marine* was not applied to the facts of the dispute on appeal. The result of that non-application of relevant precedent leads inexorably to the conclusion that the decision below is in conflict with *States Marine* and other precedent.

POINT III

THE COURT OF APPEALS WAS LED INTO ERROR BY AN UNSUBSTANTIATED ECONOMIC ANALYSIS

The Court of Appeals' uncritical acceptance of the doomsday position of both Paribas and the American Banking Association is without support either legally or economically.

The Court of Appeals adopted the position that if allowed to stand the district court's decision will "wreak havoc" in the international financial community. 927 F.2d at 716 (Appendix p. 7a). A careful reading of the district court's decision, however, demonstrates that it is limited in scope. Where the financial institution (i) directs that it be listed as a consignee; (ii) takes possession of the bills of lading; (iii) exercises "dominion and control" over the cargo from the time it was purchased and loaded until the cargo is discharged and sold; and, (iv) the proceeds are received by the consignee, then the consignee is liable for freight costs.

It is undeniable that the financing entity obtains a commercial benefit by being named as the consignee in the bills of

lading which then come into its possession. It is axiomatic that the holder of the bills of lading then controls the cargo's ultimate disposition, since the bill of lading is both a receipt and a document of title. In addition, the consignee has standing to sue the ocean carrier for any breach of the bill of lading. *See, e.g., McKinley v. Morrish*, 62 U.S. (21 How.) 343, 355 (1859); *Prevor-Mayorshon Caribbean Inc. v. Puerto Rico Marine Management Inc.*, 620 F.2d 1 (1st Cir. 1980); *Mississippi Valley Barge Line Co. v. Bulk Carriers Ltd.*, 249 F. Supp. 743 (S.D.N.Y. 1965). Indeed, if the positions of the litigants in the present matter were reversed in a case involving cargo shortage or damage, Torm is quite confident that Paribas would contest vigorously a defense by Torm that Paribas lacked standing to sue because it was a consignee "for security purposes only." The benefit obtained by any entity which appears as a consignee brings with it the corresponding duty of having to pay the transportation charges in situations such as those now before this Court. It, therefore, is a business decision for any financing institution to decide whether the obvious benefit of appearing as a consignee outweighs the occasional burden of having to pay transportation charges. Once having decided to appear as the consignee, the financing institution cannot at law or in equity unilaterally declare that it will accept only the benefits of consignee status and disclaim the corresponding duty.[5]

As long ago as 1916, the principle of a consignee's liability for transportation expenses was characterized as "an absolute legal liability." *Vane*, 231 F. at 354. Torm respectfully submits that the Court of Appeals did not articulate any acceptable rationale for creating an exception to that absolute rule

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5 If a financing institution decided *not* to appear as a consignee, it could still protect its position by requiring as a condition of payment under the letter of credit a statement that the bills of lading have listed the financing institution's customer as the consignee, but that the bills of lading have been forwarded to the financing institution. Upon receipt of those bills of lading, the financing institution would be in a position to control the ultimate disposition of the cargo but would not appear as a consignee.

for "secured parties." On the contrary, a review of the Uniform Commercial Code establishes that in foreclosing on security the reasonable expenses of the foreclosure, including transportation expenses, are routinely deducted from the sale proceeds available to the secured party. *See*, U.C.C. § 9-504 and *First Bank of South Dakota v. Von Eye*, 425 N.W.2d 630 (S.D. 1988). In light of the above, it is neither unforeseeable nor disruptive of financing transactions to hold a financing institution liable for transportation charges if it elects to be designated as the consignee on a bill of lading.

Moreover, the Court of Appeals speculated as to the possible economic impact on banks which appear as consignees on bills of lading. The concern of the court, however, was not extended to carriers. The result of this limited focus on the well-being of banks is an allocation of the risk of loss solely on the carrier, a result illogical as well as inefficient, as the secured party in reality has a greater ability to control the outcome of the transaction.[6]

The creation of an exception for banks and secured parties eviscerates a long established principle of common and maritime law. That exception was created solely to benefit financial institutions at the expense of carriers and other entities in the transportation chain. Petitioner respectfully submits that such a specious distinction only will undermine the uniform application of maritime law—and particularly principles which have been accepted since the early part of this century. *Vane*, 231 F. at 354; *Dare*, 20 F. 2d at 380.

This Court has long recognized that rules of uniform application in maritime matters are vital to further both the domestic and foreign commercial interests of the United States:

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6 *Cf.* Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, in The Economics of Contract Law 136 (A. Kronman & R. Posner eds. 1979): "[I]f one party is a superior risk bearer, the *entire* loss should be placed on him in order to encourage future parties similarly situated to insure or take other measures to minimize the economic consequences of nonperformance." (emphasis in original).

> One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970)(recognition of a right to recover for wrongful death under general maritime law will remove "tensions and discrepancies" arising from reliance on state statutes). As recognized in *Lottawanna*, the international nature of maritime transactions compels a need for an analysis and review of this matter that accurately and fully takes into account not only relevant legal precedent but also manifests an awareness of the realities of international commerce:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972). Petitioner respectfully submits that if the Court of Appeals decision is allowed to stand then the parochial interests of financial institutions will lead to the introduction of unwarranted and unnecessary economic uncertainty in the international shipping market.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 901, 1052—August Term 1990

(Argued January 28, 1991 Decided March 11, 1991)

Docket Nos. 90-7832, 90-7834

A/S DAMPSKIBSSELSKABET TORM,

Plaintiff-Appellee,
Cross-Appellant,

—v.—

BEAUMONT OIL LTD. and BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendants,

BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendant-Appellant,
Cross-Appellee.

Before:

TIMBERS, MESKILL, and CARDAMONE,
Circuit Judges.

Appeal from an order and judgment entered August 15, 1990, in the Southern District of New York, Vincent L. Broderick, *District Judge*, imposing liability for shipping charges in a maritime transaction upon a bank which acted as a secured creditor, not as owner of the goods.

Reversed.

MARK C. FLAVIN, New York, N.Y. (Paul E. O'Brien, James H. Hohenstein, and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief) *for plaintiff-appellee, cross-appellant A/S Dampskibsselskabet Torm.*

DONALD F. LUKE, New York, N.Y. (Stephen M. Lazare, Robert Penchina, and Rogers & Wells, New York, N.Y., on the brief) *for defendant-appellant, cross-appellee Banque Paribas (Suisse) S.A.*

JOHN J. GILL, Michael F. Crotty, Joanne Ames, Steven D. Rinaldi, Washington, D.C., filed a brief *for amicus curiae American Bankers Association.*

TIMBERS, *Circuit Judge*:

Appellant Banque Paribas (Suisse) S.A., Geneva ("Paribas" or "the bank") appeals from an order and judgment against Paribas entered August 15, 1990 in the Southern District of New York, Vincent L. Broderick, *District Judge*.

Appellee A/S Dampskibsselskabet Torm ("Torm" or "the shipper") commenced this admiralty and maritime action on July 18, 1986, in the District of Oregon, seeking recovery of freight and related charges. In December 1986, the case was transferred to the Southern District of New York. On March 30, 1990, the district court entered a memorandum decision and order granting Torm's motion for summary judgment and denying Paribas' motion for summary judgment. On August 10, the court denied Paribas' motion for an order amending and adding to the court's findings of fact and memorandum, or for a new trial. Final judgment was entered August 15.

On appeal, Paribas contends that the court erred in imposing liability upon it because, absent an acceptance of goods or an agreement to pay, liability for shipping charges may not be imposed on a secured creditor who did not act as an owner of the goods. On cross-appeal, Torm contends that the court erred in holding that the bank neither entered into an agreement to pay transportation costs nor accepted delivery of the cargo.

For the reasons set forth below, we reverse the district court's imposition of liability on the bank. We find no merit in the shipper's cross-appeal.

I.

We shall set forth only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Defendant Beaumont Oil Ltd., a Bermuda corporation, and its affiliate, Beaumont Oil, Inc., a Texas corporation, (collectively, "Beaumont"), routinely used Paribas' financial services. In May 1986, Beaumont sought to purchase approximately 240,000 barrels of unleaded gasoline from Corpoven S.A. ("Corpoven"), the state oil corporation of Venezuela. Pursuant to a May 22, 1986 telex to Paribas, Beaumont sought to obtain financing from the bank, in the form of a letter of credit in favor of Corpoven. In the telex Beaumont granted a "first security interest" in the cargo to Paribas and specified the documents that Corpoven would have to present to the bank in order to obtain the funds. Among the documents required was the "presentation of original bills of lading, 3/3 full set, being originally signed issued to the order of . . . Paribas . . . , notify Beaumont Oil, Inc., Houston, Texas showing as destination New York harbor." Paribas issued a letter of credit on May 23, 1986, in the amount of approximately $5.2 million, for the account of Beaumont in favor of Corpoven.

Beaumont contracted with Torm to ship the cargo, entering into a charter party that obligated Beaumont to pay all freight and related transportation charges. The ship's master signed three bills of lading on Corpoven's standard bill of lading form, issued to the "order of . . . Paribas . . . notify Beaumont . . . ." The bills of lading did not specify who was to pay freight charges.

The cargo left Venezuela aboard Torm's ship, the TORM ROTNA, on May 27, 1986, headed for New York harbor. Beaumont exercised its right, however, to redirect the ship. The TORM ROTNA ultimately discharged the cargo at Portland, Oregon, pursuant to Beaumont's directions. As the cargo approached Portland, Beaumont entered into a storage contract with Time Oil Co. ("Time" or "the warehouse"), in which Beaumont warranted that it was the "sole legal and beneficial owner" of the cargo and that Paribas was a lienor.

After Beaumont advised Paribas that it intended to store the cargo at Time, the bank sought financial information about the warehouse. Paribas also obtained information from its own sources that Time "is not very professional in their dealings". The bank subsequently instructed Beaumont "to take all necessary steps to send M/T 'Torm Rotna' for discharge of the product at any GATX terminal on the west coast." After Beaumont advised Paribas that no alternate storage was available and that demurrage aboard the TORM ROTNA was $9,000 per day, Paribas ultimately "released" the cargo and it was stored at Time.

On June 17, 1986, when the cargo arrived at Portland, Beaumont did not yet have in its possession the bills of lading that would have permitted discharge of the cargo. The charter party between Torm and Beaumont, however, provided that the cargo could be offloaded if Beaumont issued a "letter of indemnity" to Torm, which would be voided upon presentation to Torm of the full sets of original bills of lading. The letter of indemnity, which was joined in by Paribas, provided that Beaumont and Paribas agreed to indemnify

Torm "and hold you harmless in respect of any liability, loss or damage of whatsoever nature which you may sustain by reason of delivering the cargo to receivers in accordance with our request." In accordance with the terms of the parties' agreement, the agreement to indemnify ceased upon presentation of the bills of lading.

Torm discharged the cargo into Time's storage tanks. Paribas instructed Time to issue a warehouse receipt to Paribas and not to remove the gasoline without authorization from Paribas. Beaumont arranged sales. Paribas reviewed and approved the release of the gasoline to third party purchasers, received the purchase price of various parcels of the gasoline, and applied all proceeds of the sales to reduce Beaumont's indebtedness to the bank.

On June 24, Time requested permission from Paribas to regrade a portion of the gasoline as "leaded." This involved the addition of lead to the gasoline and was intended to make the product more marketable. Paribas authorized the regrade. Several other lots of gasoline likewise were regraded with the bank's authorization.

The proceeds of the gasoline sales were insufficient to repay Paribas for the sum collected by Corpoven pursuant to the letter of credit, so that Paribas had to execute on a fiduciary deposit maintained by Beaumont at the bank in order to ensure that the debt was paid in full. No transportation expenses were ever paid to Torm.

In July 1986, Torm commenced this action to recover shipping charges, which action ultimately was transferred to the Southern District of New York. Both Beaumont and Paribas were named as defendants. Beaumont, however, did not appear, and the record

does not reflect any efforts by Torm to recover from Beaumont. Rather, Torm has directed its efforts to recovering from the bank. In 1988, both Torm and the bank moved for summary judgment. The parties entered into a stipulation providing that "the parties deem this case to have been tried to the court based upon the present record and that this matter should be considered submitted to the Court for decision on all factual and legal issues."

The court heard oral argument and ultimately granted summary judgment to Torm. Although the court found that the bank did not enter into an agreement by which it became obligated to pay for the shipping costs, and found further that the bank did not "accept" the cargo, it found that Paribas exercised "dominion and control" over the cargo so that a promise to pay the freight charges could be implied. The court relied on the following factors in reaching its decision: that Paribas (1) required that it be named as consignee on the bill of lading; (2) co-signed the letter of indemnity; (3) imposed conditions on the storage of the cargo at Time; (4) authorized the sale of gasoline and applied the proceeds to reduce Beaumont's debt; (5) authorized Time to regrade the gasoline; and (6) benefited from Torm's services.

This appeal followed. The American Bankers Association filed an *amicus curiae* brief, arguing that the court's imposition of shipping costs on a mere secured creditor would wreak havoc in the international banking community.

II.

As a threshold matter, we address the propriety of exercising jurisdiction and set forth the relevant standard of review.

We hold that we have jurisdiction over the instant appeal in that the order and judgment appealed from are final within the meaning of 28 U.S.C. § 1291 (1988).

In evaluating the claims raised, we start with the proposition that the district court's findings of fact should not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a); *Amadeo* v. *Zant*, 486 U.S. 214, 223 (1988); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985). On the other hand, the court's *use* of facts to determine that Paribas was liable for shipping costs involves conclusions of law that are subject to *de novo* review. *See Lever Bros.* v. *American Bakeries Co.*, 693 F.2d 251, 255 n.4 (2 Cir. 1982).

III.

With the foregoing in mind, we believe it is necessary and appropriate, at this stage, briefly to set forth the guiding norms relevant to the imposition of freight charges. It has long been established that the primary obligation to pay shipping costs rests with the shipper, rather than with the consignee. *Louisville & N.R.R.* v. *Central Iron & Coal Co.*, 265 U.S. 59, 67 (1924); *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245, 247 (9 Cir. 1975). The reason for this is that "the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf." *Louisville & N.R.R.*, *supra*, 265 U.S. at 67. "It is only

when there is some binding obligation on the part of the consignee to pay freight charges that the courts will look beyond the shipper's primary responsibility." *States Marine*, *supra*, 524 F.2d at 247.

Such a binding obligation to pay freight charges may arise pursuant to statute or pursuant to a contractual obligation. *Id.* at 247-48. In the instant case, there is no intimation that Paribas has any statutory obligation to pay freight. *Cf.* Interstate Commerce Act, 49 U.S.C. § 10744 (1988) (setting forth liability for the payment of rates in interstate, but not international, commerce).

In the absence of a statutory obligation, "it is necessary to determine whether, under the applicable law, there may be an enforceable contract obligation." *States Marine*, *supra*, 524 F.2d at 248. "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract." *Louisville & N.R.R.*, *supra*, 265 U.S. at 67. Torm urges, on its cross-appeal, that the district court erred in concluding that Paribas did not enter into an agreement to pay freight. We hold, to the contrary, that the district court's conclusion in this regard was correct. Although the bill of lading was issued "to the order of . . . Paribas . . . notify Beaumont" and listed the freight rate as "as agreed," the bill of lading stood mute as to who was to pay the freight. The charter party, however, clearly obligated Beaumont in that respect.

Despite Beaumont's primary responsibility to pay freight, however, and the fact that Paribas was neither statutorily nor expressly contractually obligated to do so, we must make a third inquiry. That is, we must look to the *conduct* of Paribas to see whether a promise to

pay the freight "may be implied." *States Marine, supra*, 524 F.2d at 248. In determining whether such an implied obligation exists, we are guided by longstanding principles. Over seventy years ago, for example, the Supreme Court noted that, at common law, "[t]he weight of authority seems to be that the consignee is *prima facie* liable for the payment of the freight charges when he *accepts* the goods from the carrier." *Pittsburgh, C.C. & St. L. Ry.* v. *Fink*, 250 U.S. 577, 581 (1919) (emphasis added). Twelve years later, we stated that "[i]t has been authoritatively established that a consignee who receives the goods becomes legally bound to pay the freight charges." *Dare* v. *New York Cent. R.R.*, 20 F.2d 379, 380 (2 Cir. 1927). More recently, but still invoking the seemingly timeless authority of *Fink*, the Ninth Circuit stated in *States Marine, supra*, that "[t]he most obvious indication of a consignee's implied agreement to pay freight charges occurs when he accepts the goods himself, indicating that they are his own and not the shipper's." 524 F.2d at 248.

In *Dare, supra*, we held that secured creditors who received goods were liable for freight charges, even though not named as consignees, because "[s]o far as [the shipper] knew, the [creditors] were owners of the shipment." 20 F.2d at 380. The creditors held order bills of lading duly endorsed by the named consignees. *Id.* Torm invokes *Dare* as support for the proposition that there is no "exception" that *per se* protects secured creditors from being liable for shipping charges. Essential to *Dare*, however, was the fact that the secured creditor received the goods. As we explicitly stated, "We see no reason why the holder should not stand in the shoes of the consignee in respect to the obligation to pay freight *upon delivery of the goods to him*." *Id.* (empha-

sis added). The district court in the instant case explicitly found that Paribas did *not* "accept the goods." Accordingly, Torm's reliance on *Dare* is misplaced. Furthermore, although Torm urges on its cross-appeal that Paribas *did* accept the goods, we do not find the district court's factual finding to the contrary to be clearly erroneous.

"Even where there is no actual acceptance of the goods," however, "presumptive ownership may arise from [a party's] exercise of dominion and control over the shipment." *States Marine*, *supra*, 524 F.2d at 248. It is on the doctrine of presumptive ownership that the instant appeal turns.

IV.

Both the parties and the district court took *States Marine* as the obvious point of departure for this case. Since the parties urge significantly different interpretations of *States Marine*, we believe it is necessary to set forth in some detail the facts and reasoning of that short but important opinion.

In *States Marine*, freight charges resulted from two shipments of canned salmon from Alaska to Washington; the carrier, States Marine, sued both the shipper, Royal Red Seafoods, Inc. ("Royal") and Seattle-First National Bank ("Seattle-First"). *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245, 246 (9 Cir. 1975).

Royal and Seattle-First had entered into a security agreement and general pledge, in order to finance Royal's canning operations for the 1970 fishing season. Under that agreement, Seattle-First acquired "a security

interest in all of Royal's property, including canned salmon." *Id.* at 246. Financing statements were filed in Washington and Alaska. *Id.* A Royal employee prepared a "straight bill of lading" on a form supplied by States Marine. Following the printed words "Consigned to" there was inserted "Seattle First National Bank c/o Royal Red Seafoods, Inc.," followed by Royal's Seattle address. On the second shipment, the consignee was designated as "Seattle First National Bank—account of Royal Red Seafoods, Inc.," followed by the same Seattle address. Each bill contained a heading "Address Arrival Notice To" followed by Royal's name and address. *Id.* Counsel in *States Marine* prepared findings of fact, endorsed by the district court, that included the following:

> " 'The inclusion of Bank as a named party to the bills of lading was a voluntary act of Royal and was inserted without the permission of Bank. Bank did not receive copies of the bills of lading and had no knowledge of the fact that Royal had inserted Bank as a named party on the bills of lading.' "

Id. at 247 (quoting district court's findings of fact). Both salmon shipments were to be delivered to warehouses at the ports of Seattle and Bellingham, Washington, respectively. *Id.* at 246.

Seattle-First " 'did not at any time material exercise any control over the movement of the goods from Alaska to Washington . . . .' " *Id.* at 247 (quoting district court's findings of fact). Pursuant to the bills of lading, arrival notices were sent to Royal, notifying it that "its goods had been delivered and were being held in the warehouses." *Id.* at 246. The warehouses issued negotiable warehouse receipts, indicating receipt of the

cargo " 'for the account of "Seattle-First National Bank Acct. Royal Red Seafoods, Inc." Said Documents do not contain any obligation of Bank to pay any freight charges and Bank did not author, direct or prepare the phraseology, verbage [sic] or content thereof.' " *Id.* at 247 (quoting district court's findings of fact).

In accordance with the agreement between Royal and Seattle-First, the salmon was warehoused as follows:

> "negotiable warehouse receipts were issued by the warehouses to the Bank for the loan account of Royal. The salmon remained in the warehouses until Royal was able to conclude sales agreements with its customers, at which time Royal notified the Bank of the sales, and the Bank then instructed the warehouses to release the goods for sale through documents known as Banker's Orders. The proceeds from the sales of the salmon were forwarded to the Bank under a trust receipt arrangement."

Id. at 246-47.

Even though, as in the instant case, Seattle-First was named on warehouse receipts; authorized sales; and applied sale proceeds to reduce the shipper's debt to it, the court held that the bank's acts were "more indicative of a security interest than ownership . . . ." *Id.* at 249. There was no evidence that the bank there "engaged in any of the selling operations or participated in any profits from the sales. The benefits received by the Bank from the salmon sales were as a creditor receiving interest on its loans." *Id.* at 249. Moreover, even though the bank had been named consignee by the shipper, the court stated that it was "undisputed that the Bank had no knowledge that it was named by Royal

as consignee in the bills of lading." *Id.* at 248-49. Ultimately, the court held that the bank could not be held liable for the shipping costs:

> "When the goods arrived, notices were sent to Royal pursuant to instructions in the bills of lading, and no notice was sent to the Bank. Thereafter, the Bank was treated and acted at all times as a secured creditor, following standard commercial practices, and not as an owner of the goods."

Id. at 249.

V.

The critical inquiry in the instant case, as in *States Marine*, is whether the actions undisputedly taken by the bank were sufficient to confer it with the status of a presumptive owner. It is to that inquiry that we now turn.

Paribas and the *amicus* argue that the bank's actions here, like those of the bank in States Marine, simply were consistent with Paribas' status as a secured creditor and did not make it liable for freight charges. Paribas argues that the court foisted liability upon it in a situation where a secured creditor traditionally would not have been liable and without making the critical determination that Paribas was the "presumptive owner" of the goods. In arguing that it was simply a secured creditor rather than the owner, Paribas relies heavily on Beaumont's ability to direct the TORM ROTNA, the fact that Beaumont itself arranged sales of the gasoline to third parties, and the fact that the bank did not stand to gain the profits of the sales (over and above its loan to Beaumont).

Although the district court did not explicitly invoke the doctrine of "presumptive ownership" in declaring Paribas liable for freight, we think it is clear that that is the theory upon which the court implicitly relied. The district court's imposition of liability on the secured creditor, however, under these circumstances appears to be unprecedented. It is a result we cannot sanction. This is not a case where the bank accepted the goods or otherwise acted in a manner that would have led to its anticipating liability.

(A)

The factors relied upon by the district court do not sufficiently distinguish it from *States Marine* so as to justify its contrary holding.

1. *Being Named on the Bills of Lading*

The district court relied heavily on the fact that "defendant here, unlike the bank in *States Marine*, required that it be named as consignee on the bills of lading." The fact that Paribas was listed on the bills of lading at its own behest, however, does not compellingly distinguish its action from those of Seattle-First. As Paribas points out, *States Marine* involved a shipment from one state (Alaska) to another state (Washington), and thus was governed by the Uniform Commercial Code ("U.C.C."). In order to perfect its security interest, the bank there needed only to make the appropriate U.C.C. filings in both Washington and Alaska, which it did. *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245, 246 (9 Cir. 1975).

In this case, however, the disputed shipment originated in Venezuela and was not governed by the U.C.C.

at the commencement of the voyage. It was not unreasonable or inconsistent with its role as a secured creditor for Paribas to be named on the bills of lading under these circumstances. Schoenbaum, *Admiralty & Maritime Law* 300 (1987) ("An intermediary bank that extends credit is fully protected by becoming a consignee or by retaining possession of the bill [of lading]"). Indeed, it is not uncommon for banks to be named on bills of lading. *Commercial Trading Co.* v. *Hartford Fire Ins. Co.*, 466 F.2d 1239, 1241 n.3 (5 Cir. 1972) ("In quite an ordinary financial arrangement, Commercial advanced the sums needed for the purchases by arranging letters of credit through the Trade Bank and Trust Company of New York. *As is customary*, these letters of credit required that the . . . seller/shipper draw the bills to the order of Trade and Trust, which upon receipt of the bill from the seller's . . . bank charged Commercial's account for the amount of the accompanying drafts.") (emphasis added).

A bank being named on the bill of lading does not mean that the bank is the owner of the goods. *Mississippi Valley Barge Line Co.* v. *Bulk Carriers, Ltd.*, 249 F. Supp. 743, 745 (S.D.N.Y. 1965) ("The Dori was loaded in Germany, at which time bills of lading were issued by the Master covering the carriage of the cargo to New Orleans and *delivery there to the order of Franklin National Bank* notify Impex. It must be assumed that the delivery provisions in the bill of lading were on instructions of Nimpex, charterer of the Dori. In an affidavit, *it is stated that Impex was the owner of the cargo.*") (emphasis added).

2. *Co-signing the Letter of Indemnity*

In a footnote, the district court found that "[t]he letter of indemnity was vacated once the original bills of lading appeared and hence played no substantive part in the developing relationship between plaintiff, Beaumont Oil Ltd. and defendant. It has, however, some significance in evidencing the continuing activist role played by defendant." While we agree with the district court's prefatory sentence, we are constrained to disagree that any "significance" that attached to Paribas' "activist role" was enough to impose liability on the bank.

We agree with Paribas that the proper inquiry was not whether the secured creditor was "active," but rather whether its activity was indicative of an ownership interest. Signing the letter of indemnity did not rise to that level. The letter of indemnity simply protected Torm from any liability for releasing the cargo. It is unremarkable that Paribas, which had a security interest in the cargo, joined in that letter.

3. *Imposing Conditions on Warehousing the Cargo at Time*

The district court stated that, while Paribas ultimately permitted the oil to be stored at Time, "it imposed certain conditions on this storage," including that it be issued warehouse receipts and that the cargo not be removed without Paribas' authorization. These actions again were simply consistent with Paribas' status as a secured creditor. Its possession of warehouse receipts was prudent in light of its security interest. For example, according to the explicit terms of the U.C.C.,

> "During the period that goods are in the possession of the issuer of a negotiable document therefor, a

> security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during such period is subject thereto."

Uniform Commercial Code § 9-304(2) (1972). *See also* Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* ¶ 7.13 (2d ed. 1980) (addressing field warehousing) ("In order to maintain control over the inventory in the field warehouse, the warehouse company hires and bonds a manager . . . . The warehouse company then issues *non negotiable receipts, which normally run to the secured party as consignee.*") (emphasis added).

The process by which Paribas authorized sales also was consistent with its role as a secured creditor. Notably, the bank in *States Marine* did precisely what Paribas did here—*i.e.*, receive a warehouse receipt and then authorize sales. It is difficult to improve upon the court's statement in that case, where the facts closely paralleled those of the instant case:

> "The Banker's Orders authorizing the warehouse to release the [cargo] as [shipper] sold it were standard devices in warehouse receipt financing. Since the goods were subject to the Bank's security interest, they could not be sold without the Bank releasing that interest."

States Marine, *supra*, 524 F.2d at 249.

4. *Authorization of Sales and Application of Monies to Reduce Beaumont's Debt*

The district court found that:

> "As Beaumont Oil Inc. arranged the sales of portions of the stored oil it first requested that defendant release a certain amount of the oil to a certain purchaser, and defendant then authorized Time to release the amount of oil requested by Beaumont to that party; the receipts of these sales were received by defendant and applied against Beaumont Oil, Inc.'s and Beaumont Oil Ltd.'s debt to defendant."

Here, as in *States Marine*, *supra*, however,

> "There is no evidence that the Bank engaged in any of the selling operations or participated in any profits from the sales. The benefits received by the Bank from the [cargo] sales were as a creditor receiving interest on its loans."

524 F.2d at 249.

5. *Authorization of Regrade*

The district court stated that "[o]n June 26, 1986 defendant authorized Time to regrade the stored oil." We agree with Paribas and the *amicus* that this factor is not indicative of an ownership interest. As both point out, where the value of a bank's collateral is dependent upon the collateral's classification, banks have always acted to ensure that the collateral is not reclassified into an unsalable form, which would render their collateral worthless.

6. *Benefiting from Torm's Services*

The district court, somewhat cryptically, found that "[d]efendant clearly benefitted from plaintiff's services. Even assuming that defendant did not fully recover the amount of its loan to Beaumont . . . defendant's losses would have been even greater had not plaintiff delivered the oil." If the court meant that Torm's transportation of cargo somehow benefitted Paribas, this contingency is irrelevant to the question whether Paribas acted as a presumptive owner. It was Beaumont, not Paribas, that made transportation arrangements and directed the course of the TORM ROTNA. If the court meant that Paribas benefited from the cargo *sales*, that benefit, as stated above, was "as a creditor receiving interest on its loans." *States Marine*, *supra*, 524 F.2d at 249.

(B)

Having carefully considered all of the factors relied upon by the district court, we are persuaded that it erred in imposing liability upon Paribas. As the court concluded in *States Marine*, *supra*, the bank simply cannot be held liable for shipping charges under the circumstances of this case:

> "[T]here [is no] evidence that [the carrier] was misled by any act of the Bank. It is significant also that [carrier] sent its bills for the shipping charges to [shipper] and not to the Bank.
>
> . . . Nor is there evidence of acts of dominion or control by the Bank sufficient to create a presumptive ownership and implied obligation to pay the shipping charges."

Id.

The *amicus* points out that "Paribas was acting in accordance with standard commercial banking practices and the customary practice of all secured creditors by being named as the order party in the bill of lading and by monitoring its collateral." Paribas explicitly raises the disturbing and not unrealistic specter of carriers routinely going after "deep pocket" financial institutions rather than shippers if it as a secured creditor is found liable in this case. We agree that the district court applied the law to the facts of this case in a manner which, if allowed to stand, would subject the entire banking industry to a vast area of liability simply for following commonplace and prudent commercial banking practices.

As two learned commentators have stated, a creditor's interest rate is based upon a risk calculation:

> "A potential creditor wants to know whether and to what extent any security interest he takes in specific property of his debtor will have priority over other claims to that property. To the extent that the creditor is uncertain about the priority of his security interest, and thus about whether he will recover his loan in full if the debtor defaults, he will require a higher interest rate from the debtor."

Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan. L. Rev. 175, 175 (1983). In this case Paribas took aggressive steps to protect its security interest, and presumably it set an interest rate with those steps in mind. Paribas acted in a manner consistent with and accepted in international commercial transactions and did not enter into that transaction with the expectation that it was potentially subject to freight liability; it did not set an interest rate

with that contingency in mind. We will not punish Paribas for acting as a prudent creditor nor force future creditors involved in admiralty transactions to choose between acting passively, with the risk of losing a security interest, and acting aggressively, with the risk of being liable for freight charges. We will not create that modern-day Scylla and Charybdis. There are enough perils on the high seas.

VI.

To summarize:

We hold that we have jurisdiction over the instant admiralty appeal. It has long been established that shippers are primarily liable for shipping charges. A court should look beyond the shipper's primary obligation only pursuant to statutory or contractual obligations, or if the conduct of another party gives rise to an implied obligation to pay freight. In *States Marine Int'l, Inc.* v. *Seattle-First Nat'l Bank*, 524 F.2d 245, 246 (9 Cir. 1975), the leading case in this area, the court held that a bank's actions with respect to cargo were not indicative of ownership and thus did not give rise to liability for freight charges. Likewise, in the instant case the bank acted as a secured creditor rather than as the presumptive owner of cargo. Accordingly, the district court erred in imposing an obligation to pay freight upon the bank. Moreover, we are not persuaded by the additional bases for imposing liability urged by the shipper on its cross-appeal.

Reversed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

86 Civ. 9544 (VLB)

March 30, 1990

A/S DAMPSKIBSSELSKABET TORM,

Plaintiff,

—v.—

BEAUMONT OIL LTD. AND
BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendants.

Mark C. Flavin and Paul E. O'Brien (Haight, Gardner, Poor & Havens) *for Plaintiff*.

Donald F. Fluke (Rogers & Wells) *for Defendant Banque Paribas (Suisse) S.A*.

VINCENT L. BRODERICK, D.J.

On November 14, 1990 oral argument was held on pending cross-motions for summary judgment. The parties previously stipulated that on the papers before me this case would be submitted to me for plenary disposition. The parties submitted proposed findings of fact and conclusions of law. This order contains my findings of fact and conclusions of law.

Since the majority of the facts are not in dispute I shall not repeat them here. As trier of fact I find the facts listed in plaintiff's proposed findings of fact at ¶¶ 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 28, 29,

30, 31, 32, 35 and 38. I also find the facts listed in defendant's proposed findings of fact ¶¶ 2, 6, and 7.

Defendant Banque Paribas did not enter into an agreement by which it became obligated to pay for the shipping costs allocable to Beaumont Oil Ltd.'s oil aboard plaintiff's ship, the M/T *Torm Rotna*.[1] Nor did the defendant accept the oil. *Compare Waterman S.S. Corp. v. 350 Bundles of Hardboard*, 1984 AMC 2709, 603 F. Supp. 490 (D. Mass. 1984) (consignee accepted goods) with *States Marine Intl., Inc. v. Seattle-First Nat. Bank*, 1976 AMC 1463, 524 F.2d 245 (9 Cir. 1975). Thus the dispositive issue raised by this action is whether defendant exerted "dominion and control" over the oil so that a promise by defendant to pay the freight charges may be implied. See *States Marine Intl., Inc. v. Seattle-First Nat. Bank*, 1976 AMC 1463, 1466, 524 F.2d 245, 248 (9 Cir. 1975); *Ivaran Lines v. Sutex Paper & Cellulose Corp.*, 1987 AMC 690 (S.D. Fla. 1986). I find that defendant did exercise such "dominion and control" over the oil and therefore is liable to plaintiff for the shipping costs.

1) In issuing a letter of credit at the behest of Beaumont Oil, Ltd., defendant required the presentation, *inter alia*, of a "Full Set Original 3/3 Clean 'On Board' Marine Bills of Lading Originally Signed Issued to the Order of Banque Paribas (Suisse) S.A., Geneva notify Beaumont Oil, Inc., Houston, Texas Showing As Destination New York Harbor." Thus defendant here, unlike the bank in *States Marine*, required that it be named as consignee on the bills of lading.

2) On June 12, 1986 when plaintiff's ship reached Portland, Oregon, defendant and Beaumont Oil Inc. signed a letter of indemnity running to plaintiff, and plaintiff agreed

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1 Beaumont Oil Ltd., although a named defendant and the party who entered into the Charter Party agreement with plaintiff, has not appeared in this action. Its affiliate, Beaumont Oil, Inc. was placed in involuntary bankruptcy in September, 1986. The exact relationship between Beaumont Oil Inc. and Beaumont Oil Ltd. is unclear. However, both Beaumont Oil Inc. and Beaumont Oil Ltd. did maintain accounts and enter into credit and security agreements with defendant. As a result, defendant held valid security interests in all of Beaumont Ltd.'s and Beaumont Oil Inc.'s assets.

to release the oil on board the *Torm Rotna*, although the original bills of lading were not presented. Defendant co-signed the letter of indemnity even though its signature was not required by the charter party between Beaumont Oil Ltd. and plaintiff.[2]

3) At this time Beaumont Oil Ltd. also was seeking a storage facility for the oil. However, when it decided to store the oil at a facility owned by Time Oil Co. ("Time"), Paribas' employee, Nadine Soguel, telexed Beaumont Oil Inc. on June 16, 1986 stating, in part, that:

> "Before we can authorize the discharge of the product on board M/T *Torm Rotna*, kindly forward to us financial information on the above mentioned terminal company."

The next day, Soguel and Kikka Harrison, another Paribas employee, again telexed Beaumont Oil Inc., stating:

> "Following our yesterday's phone conversation, kindly take note that due to lack of sufficient information Paribas will not authorize the discharge of the product on board M/T *Torm Rotna* to the above mentioned terminal company.
>
> As there is no financial information available, no serious bank references and moreover, we have been told by Paribas Los Angeles that this terminal company is not very professional in their dealings, we hereby instruct you to take all necessary steps to send M/T *Torm Rotna* for discharge of the product at any GATX terminal on the west coast."

While defendant did, thereafter, allow the oil to be stored at Time, it imposed certain conditions on this storage. In a telex dated June 20, 1986 Harrison notified Time that the stored oil "is not to be removed without prior verified written

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2 The letter of indemnity was vacated once the original bills of lading appeared and hence played no substantive part in the developing relationship between plaintiff, Beaumont Oil Ltd. and defendant. It has, however, some significance in evidencing the continuing activist role played by defendant.

authorization from Banque Paribas (Suisse) S.A. Geneva." On the same day Time directly confirmed to defendant that "Time Oil Co. will issue warehouse receipt nbr [number] 3003 in favor of Banque Paribas (Suisse) S.A. Geneva upon completion of proper gauging and inspection."

4) The instructions in Harrison's June 20, 1986 telex were followed. As Beaumont Oil Inc. arranged the sales of portions of the stored oil, it first requested that defendant release a certain amount of the oil to a certain purchaser, and defendant then authorized Time to release the amount of oil requested by Beaumont to that party; the receipts of these sales were received by defendant and applied against Beaumont Oil Inc.'s and Beaumont Oil Ltd.'s debt to defendant. This procedure was followed numerous times until all of the stored oil was sold.

5) On June 26, 1986 defendant authorized Time to regrade the stored oil.

6) Defendant clearly benefitted from plaintiff's services. Even assuming that defendant did not fully recover the amount of its loan to Beaumont Oil Inc. and Ltd., defendant's losses would have been even greater had not plaintiff delivered the oil.

In light of these actions by the defendant, I find that defendant exercised "dominion and control" over the shipment of oil on board plaintiff's ship and therefore is liable to plaintiff for freight charges allocable to that oil.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 90-7832, -7834

Filed April 19, 1991

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the nineteenth day of April, one thousand nine hundred and ninety-one.

A/S DAMPSKIBSSELSKABET TORM,

Plaintiff-Appellee, Cross-Appellant,

—v.—

BEAUMONT OIL LTD, and
BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendants,

BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendant-Appellant, Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee-Cross-Appellant A/S DAMPSKIBSSELSKABET TORM.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

86 Civ. 9544 (VLB)

A/S DAMPSKIBSSELSKABET TORM,

Plaintiffs,

—against—

BEAUMONT OIL LTD.,
BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF A/S DAMPSKIBSSELSKABET TORM Pursuant to the direction of the Court at the hearing on November 14, 1989, Dampskibsselskabet Torm respectfully submits the following proposed findings of fact and law.

I. PROPOSED FINDINGS OF FACT

1. A/S Dampskibsselskabet Torm ("Torm") is a corporation organized under and existing pursuant to the laws of the Kingdom of Denmark and was at all times pertinent hereto Owner of the M/T TORM ROTNA.

2. Banque Paribas (Suisse) S.A. ("Paribas") is a banking organization organized under and existing pursuant to the laws of the Swiss Confederation with an office in Geneva, Switzerland.

3. Beaumont Oil, Inc. ("Beaumont") was a corporation organized under and existing pursuant to the laws of a state of the United States.

4. On May 21, 1986, Beaumont advised Paribas that it was in the process of finalizing a purchase of unleaded gas from Corpoven, a State oil company of Venezuela, and that it would request that Paribas post a letter of credit in favor of Corpoven for the purchase price. (Harrison, Ex. 1.) Beaumont had a banking relationship with Paribas, and the financing of the Corpoven cargo was consistent with that relationship. (Harrison, Tr. p. 19; lines 9-11.)

5. The following day, May 22, 1986, Beaumont requested that Paribas open a letter of credit in favor of Corpoven for five million, one hundred seventy-one thousand and forty dollars ($5,171,040.00) (Harrison, Ex. 2).

6. On May 23, 1986, Paribas opened the requested letter of credit in favor of Corpoven in the amount of $5,171,040.00. As a condition of Corpoven drawing on the letter of credit it was a requirement that Corpoven present to Paribas, *inter alia*:

> Full set original 3/3 clean "on board" marine bills of lading originally signed to the order of Banque Paribas (Suisse) S.A., Geneva notify Beaumont Oil, Inc. Houston, Texas showing as destination New York Harbor. (See Harrison, Ex. 3; Lazare, Ex. E.)

7. Paribas was aware at the time that it issued the letter of credit that it was to be named as the consignee of the cargo in the bills of lading. (See Harrison, Tr. p. 156; lines 13-16.) Paribas subsequently received the original bills of lading from Corpoven, at the latest by June 26, 1986 when Paribas advised Beaumont that Paribas was holding the original bills of lading (See Harrison, Ex. 35). Paribas ultimately forwarded the original bills of lading to Torm letter dated July 11, 1986. (Lazare Ex. D.)

8. At the time Paribas issued the letter of credit, Beaumont did not have funds in its account with Paribas sufficient to repay the funds made available by Paribas to Corpoven. (See, Harrison 1 Tr. pp. 34-35.) Paribas was aware that it was taking a commercial risk that the relevant

market might decline between the time the cargo was purchased and loaded in Venezuela aboard the TORM ROTNA and the time of its sale in the United States. (Harrison Tr. p. 35, lines 7-12.) Contemporaneous documentation submitted to Paribas' "Risk 1 Committee", alerted the committee to that risk by noting that the cargo was "unsold." (Harrison, Exs. 4, 4A.)

9. The Letter of Credit issued for Beaumont and in favor of Corpoven was subject to an agreement between Beaumont and Paribas which provided, *inter alia*, in paragraph 6:

> ". . . we [Beaumont] hereby grant to you [Paribas] a security interest in, *and recognize and admit your ownership in and unqualified right to the possession and disposal of all property shipped under*, pursuant to or in connection with Credit or related in any way to any Credit, and in and to any and all documents of title, *bills of lading*, shipping documents, warehouse receipts, and, additionally, pipeline nominations, pipeline tickets and pipeline tender letters in the case where such property consists of crude oil and/or petroleum or related products or products derived therefrom, securities, chattel paper, policies and/or certificates of insurance and other documents and instruments of any kind or nature in any way accompanying, related to or arising out of any Credit and the property related thereto and to any drafts, instruments, demands or acceptances drawn or made or purportedly drawn or made thereunder (whether or not such property, documents or other items specified be released to us, or upon our order, on trust or bailee receipt or otherwise under any instrument whereby you retain a security interest), and in and to all accounts, accounts receivable, contract rights, inventory, general intangibles, claims, credits, monies, demands, patent and trademark rights related to or arising out of any such Credit or the property and the proceeds of each and all of the foregoing, together with all monies on deposit with you or any party acting on your behalf, until such time as all the Liabilities shall have been fully

paid and discharged. All of the foregoing referred to above is collectively called the "Collateral".

* * *

In the event that you deliver or permit to be delivered to us any property consisting of Collateral covered by or in any way relating to any Credit or the relative documents of title or any other documents prior to your having received reimbursement with respect to the relative drafts, demands, instruments or acceptances as herein provided, we agree to execute and deliver to you trust receipts or other security instruments and financing statements complying with the requirements by you, and to pay all filing fees in connection therewith, it being understood that your rights as specified herein or therein shall be in addition to, and not in limitation of your rights under any applicable law. To the extent permitted by applicable law, we hereby authorize you to file such financing statements without our signature.

(See Harrison Declaration, Exhibit G) (Emphasis added).

10. On May 22, 1986, Torm, as Owner of the M/T TORM ROTNA, and Beaumont Oil Ltd. entered a charter party on the ASBATANKVOY form. The charter envisioned a voyage from Venezuela to New York and the carriage of a minimum of 28,000 metric tons of clean petroleum products. (Kjaerulff Exhibit 3.)

11. The charter party provided that the charterer would have the right to change the nomination of the discharge port even after bills of lading were issued and the vessel had sailed. However, any extra time and expense associated with the change of nomination would be for Charterer's account, and freight would be calculated on the voyage actually performed. (Kjaerulff Exhibit 3; Special Clause 19.)

12. On May 24, 1986 the TORM ROTNA tendered notice of readiness at El Pallito, Venezuela and proceeded to load

241,874 U.S. Barrels of unleaded gasoline. (Kjaerulff Tr. p. 46 at lines 11-18.)

13. On May 26, 1989 at her completion of loading, the Master of the M/T TORM ROTNA signed three (3) original bills of lading for 241,874 U.S. barrels of unleaded gasoline in bulk aboard his vessel. The bills of lading were on the standard Corpoven form and provided that Corpoven had shipping on the TORM ROTNA:

> "ONE LOT OF UNLEADED GASOLINE IN BULK, AT 60 DEGREES F to be delivered to the port of NEW YORK HARBOR, U.S.A., or so near there to as the vessel can safely get, always afloat, unto: TO THE ORDER OF BANQUE PARIBAS (SUISSE) S.A. GENEVA NOTIFY BEAUMONT OIL, INC. HOUSTON, TEXAS, or order on payment of freight at rate of AS AGREED." (Harrison, Ex. 55; Lazare Ex. B (clearer copy).)

14. The term AS AGREED referred to the freight rate specified in the charter party for the TORM ROTNA. (See Kjaerulff Tr. p. 51, lines 9-21; See also, Kjaerulff Tr. pp. 52, lines 15-21.)

15. After the cargo was loaded aboard the TORM ROTNA, the price of gasoline dropped, and Paribas and Beaumont decided to divert the vessel to the west coast of the United States, where a more favorable price might be obtained for the cargo, all of which remain unsold. (Harrison Tr., lines 13-16; Harrison Tr., p. 53, lines 9-27.)

16. On June 12, 1986, Paribas concern with respect to the cargo aboard the TORM ROTNA increased, as Mr. Gabriel Perahia, a Senior Vice President in the Credit Department, was advised that the drop in market price was substantial, that the prevailing price was below the "break-even" or purchase price of the cargo, and that Paribas could suffer a loss of the transaction. (Harrison Tr., p. 54, lines 1-25; Harrison Tr., p. 57, lines 4-7.)

17. After being advised of the situation, Mr. Perahia directed representatives of Paribas to consult with Beaumont on a daily basis with respect to sales of the TORM ROTNA's cargo. (Harrison Tr., p. 55, lines 1-25.)

18. Both Ms. Kikka Harrison and Ms. Nadine Soguel of Paribas conducted independent inquiries on a daily basis into the market for the TORM ROTNA's cargo. (See Harrison Tr., p. 79, lines 11-19.)

19. On June 12, 1986, the TORM ROTNA was diverted to Portland, Oregon, and Beaumont advised Paribas that it intended to discharge the TORM ROTNA's cargo into facilities controlled by Time Oil Company ("Time Oil") (See, Harrison Ex. 10). It was from that facility that the product would be sold and released to third parties.

20. After being advised that the intention was to discharge the TORM ROTNA's cargo to a Time Oil facility, Paribas stated that it would not authorize the discharge until it received financial information concerning Time Oil. Ms. Soguel stated in a telex of June 16, 1986:

> BEFORE WE CAN AUTHORIZE THE DISCHARGE OF THE PRODUCT ON BOARD M/T "TORM ROTNA", KINDLY FORWARD TO US FINANCIAL INFORMATION ON THE ABOVE MENTIONED TERMINAL COMPANY.
>
> WE THANK YOU IN ADVANCE FOR YOUR PROMPT COOPERATION.
>
> BEST REGARDS,
> NADINE SOGUEL
> BANQUES PARIBAS (SUISSE) SA, GENEVA
> (Harrison, Ex. 15).

21. The following day, Ms. Soguel and Ms. Harrison prohibited any discharge to Time Oil, stating

> *URGENT* URGENT *URGENT*
>
> ATTENTION M. WINDHAM / L. JOHNSON
>
> RE.: TIME OIL.

FOLLOWING OUR YESTERDAY'S PHONE CONVERSATION, KINDLY TAKE NOTE THAT DUE TO LACK OF SUFFICIENT INFORMATION PARIBAS WILL NOT AUTHORIZE THE DISCHARGE OF THE PRODUCT ON BOARD M/T "TORM ROTNA" TO THE ABOVE MENTIONED TERMINAL COMPANY.

AS THERE IS NO FINANCIAL INFORMATION AVAILABLE, NO SERIOUS BANK REFERENCES AND MOREOVER, WE HAVE BEEN TOLD BY PARIBAS LOS ANGELES THAT THIS TERMINAL COMPANY IS NOT VERY PROFESSIONAL IN THEIR DEALINGS, WE HEREBY INSTRUCT YOU TO TAKE ALL NECESSARY STEPS TO SEND M/T "TORM ROTNA" FOR DISCHARGE OF THE PRODUCT AT ANY GATX TERMINAL ON THE WEST COAST.

WE THANK YOU IN ADVANCE FOR YOUR COOPERATION.

BEST REGARDS,
KIKKA HARRISON / NADINE SOGUEL
BANQUE PARIBAS (SUISSE) S.A., GENEVA
(Harrison, Ex. 19).

22. On June 17, 1986, Beaumont advised Paribas that there was no alternative facility available, and that financial information and a bank reference for Time Oil would be forwarded. Beaumont also advised Paribas that the demurrage charge for the TORM ROTNA was nine thousand dollars ($9,000.00) per day. (Harrison, Ex. 20.) Paribas ultimately authorized discharge into the Time Oil facilities (Harrison Tr., p. 80, LINES 18-26.)

23. Although Paribas ultimately authorized a discharge to Time Oil, it ensured that the warehouse receipt was made out to the order of Paribas and it further notified Time Oil directly by telex that the TORM ROTNA's cargo

> ". . . IS NOT TO BE REMOVED WITHOUT PRIOR VERIFIED WRITTEN AUTHORIZATION FROM BANQUE PARIBAS (SUISSE) SA, GENEVA . . ." (Harrison, Ex. 23.)

24. On June 20, 1986, Time Oil advised only Paribas that it received 107,063.70 bbls at its Linnton Terminal and 135,131.05 bbls at its St. John Terminal. Time Oil then confirmed directly to Paribas that

> TIME OIL WILL ISSUE WAREHOUSE RECEIPT NBR 3003 IN FAVOR OF BANQUE PARIBAS (SUISSE) S.A. GENEVA UPON COMPLETION OF PROPER GAUGING AND INSPECTION. (Harrison, Ex. 25.)

25. On June 2, 1986 Time Oil issued a non-negotiable warehouse receipt in favor of Paribas and telexed the text of that receipt to Paribas. (Harrison, Ex. 27.)

26. At approximately the same time Paribas was dealing with the issue of Time Oil receiving the TORM ROTNA's cargo, Paribas was advised that the Master the the TORM ROTNA would not discharge the cargo without presentation of an original bill of lading. (Kjaerulff, Ex. 19). Consequently, Beaumont and Paribas provided Torm with a letter of indemnity which in the words of Paribas' Ms. Harrison "induces the master of the vessel to discharge." (Harrison Tr., pp. 59-60, lines 26-4.)

27. The letter of indemnity was telexed to Torm and although it ostensibly was issued by Beaumont, it was "joined in" by Paribas. (See, Kjaerulff, Ex. 1.) In relevant part it stated that the cargo on the vessel was ". . . consigned to Banque Paribas (Suisse) S.A. . . ." and further assured Torm that Beaumont and Paribas agreed "to indemnify you [Torm] and hold you harmless in respect of any liability, loss or damage of whatsoever nature which you may sustain by reason of delivering the cargo. . . ." (See, Kjaerulff, Ex. 1.)

28. After receipt of the letter of indemnity, Torm authorized the discharge of the TORM ROTNA's cargo. (Kjaerulff, p. 94, lines 1-5.)

29. After the TORM ROTNA discharged, Paribas approved the release of the product to third party purchasers, received the purchase price of various parcels of product and applied all proceeds from the sales to reduce Beaumont's debt to Paribas. On June 24, 1986 Beaumont requested that Paribas release 20,000 bbls. of unleaded gasoline from the Time Oil terminal for delivery to two customers. (Harrison, Ex. 29.) That same day, Paribas instructed Time Oil to release the 20,000 bbls., while admonishing Time Oil that

> SHOULD SAID BARRELS NOT BE RELEASED, IT IS WELL UNDERSTOOD THAT THEY SHOULD IMMEDIATELY BY PLACED BACK UNDER WHR [WAREHOUSE RECEIPT] TO THE BANK'S ORDER. (HARRISON, EX. 30.)

The proceeds of that sale were received by Paribas and employed to reduce Beaumont's debt to Paribas.

30. On June 24, 1986, Time Oil requested Paribas' permission to regrade a portion of the gasoline as "leaded". Paribas authorized that regrade in its telex of June 26, 1986. (See Harrison, Exs, 32 and 34.)

31. Over the next two to three weeks, the same procedure was followed with respect to the sale of other lots of the gasoline carried by the TORM ROTNA. On June 25, 1986 Beaumont requested that Paribas release 70,000 bbls., and Paribas authorized that release on June 27, 1986, subsequently receiving the sales proceeds to reduce Beaumont's debt. (Harrison Exs: 33; 36; Harrison Tr. p. 107, lines 11-25.)

32. The same procedure was followed with respect to a 20,000 bbls. lot on July 2 and 3, a 20,000 bbls lot on July 9, and a 50,000 bbls lot, a 20,000 bls lot, and a 37,000 bbls. lot on July 11 and 14. (Harrison Exs, 39, 40, 43, 45, 47, 50 and 51.) On every occasion, Time Oil was admonished to return any amount not released pending Paribas instructions and the

proceeds of every sale were received by Paribas and applied to Beaumont's debt. (Harrison, Tr. p. 112 and 123.)

33. As early as June 24, 1986, Beaumont had advised Paribas that at least $586,207.22 should be remitted to the owners of the TORM ROTNA to compensate them for the carriage of the gasoline and the deviation of the cargo from New York to the West Coast. (Harrison, p. 115, lines 16-28.) Paribas did not remit that amount to the owners of the TORM ROTNA since it used all funds received for the sale of cargo carried by the TORM ROTNA to reduce Beaumont's debt to Paribas.

34. After the freight and deviation charges were not received in the normal course of maritime commerce, Torm referred the matter to the Danish Shipowners Defense Association and its legal representatives in the United States. On July 3, 1986, Beaumont quoted verbatim to Paribas the text of a telex from Torm which advised Beaumont of those facts. (See, Harrison, Ex. 41.)

35. On July 7, 1986, Beaumont telexed Paribas to advise it that the charter party between Beaumont and Torm gave Torm a carrier's lien on the gasoline which was transported from Venezuela to Portland by the TORM ROTNA. (See, Harrison, Ex. 42.)

36. On July 11, 1986, a representative of the Danish Shipowners Defense Association, Peter Damgaard, Esq., spoke with Paribas' Kikka Harrison and he was advised that funds would be received over the weekend and that amount would be transferred to Torm. (See, Harrison Ex. 48; Harrison Tr. p. 130, lines 2-12.)

37. At the time the Paribas representative made the representation to Peter Damgaard referred to in 35, *supra*, she knew that no funds would be remitted to Torm and that there would not be funds sufficient to pay the transportation expenses, if Paribas' debt was satisfied in the first instance from the sale of the TORM ROTNA's cargo. (Harrison, Tr. p. 133, lines 2-4, p. 134, lines 1-8.)

38. No freight, deviation, demurrage or related expenses has been paid to Torm. (See, Harrison, Tr. p. 158, lines 18-19, and Verified Complaint filed in the matter.)

39. Although the entire proceeds of the sale of the cargo carried by the TORM ROTNA were received by Paribas and applied to Beaumont's debt to Paribas, those proceeds were not sufficient to repay Paribas for the sums collected by Corpoven under the letter of credit. It was necessary for Faribas also to execute on a fiduciary deposit maintained by Beaumont with Paribas to ensure the Paribas debt was paid in full and that Paribas did not lose any money on the TORM ROTNA transaction. (Harrison Tr. p. 134; pp. 145-146.)

CONCLUSIONS OF LAW OMITTED FROM APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

86 Civ. 9544 (VLB)

A/S DAMPSKIBSSELSKABET TORM,

Plaintiff,

—vs.—

BEAUMONT OIL LTD. and
BANQUE PARIBAS (SUISSE) S.A., GENEVA,

Defendants.

DEFENDANT BANQUE PARIBAS (SUISSE) S.A.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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UNITED STATES DISTRICT COURT

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Pursuant to the Court's request made at the conclusion of oral argument in this matter on November 14, 1989, defendant Banque Paribas (Suisse) S.A. submits the following proposed findings of fact and conclusions of law:

A. FINDINGS OF FACT

Parties

1. Plaintiff A/S Dampskibsselskabet Torm ("Torm") is, and at all times relevant to this action was, a large international shipping company based in Denmark. It has been in the shipping business for approximately 100 years, it is publicly owned, and its stock is traded on the Danish Stock Exchange. It conducts a broad range of shipping activities, including "tanker" service in which Torm charters its own

vessels to shippers throughout the world, on a "spot market" basis, wherever a cargo is located that needs to be transported to another locale. (Kjaerulff Dep. at 7-9, 12-13).

2. Defendant Beaumont Oil Limited ("Beaumont Ltd.") is a Bermuda corporation which, in 1986, was engaged in the petroleum business. Beaumont Ltd. is affiliated with a separate company, Beaumont Oil Inc., which, in 1986, was a Texas corporation that was also engaged in the petroleum business. (Harrison Dep. at 6). There is nothing in the record to establish that Beaumont Inc. was or is the parent corporation of Beaumont Ltd. Although named in this action, Beaumont Ltd. has not appeared in this action.

3. Defendant Banque Paribas (Suisse) S.A. (the "Bank"), sued herein as "Banque Paribas (Suisse) S.A., Geneva" is, and at all times relevant to this action was, a Swiss banking corporation headquartered in Geneva, Switzerland, and engaged in the business of providing a full range of banking services, including all aspects of commercial banking and lending, to its customers. (Harrison Decl. ¶ 2).

Nature of the Action

4. This action is to recover approximately $600,000 in freight and related transportation charges incurred when Torm carried a cargo of gasoline aboard one of its ships from Venezuela to Portland, Oregon in May 1986. Torm contracted with Beaumont Ltd. in the form of a charter party to provide carriage of the cargo, and Beaumont Ltd. agreed in that charter party to pay Torm's freight and related transportation charges. Torm, however, delivered the cargo to Beaumont Inc. in Oregon without first getting Beaumont Ltd., or even its affiliate Beaumont Inc., to pay Torm's freight charges. (Kjaerulff Dep. at 94-96, 105-06). Torm now seeks to collect the freight from the Bank, which financed Beaumont Ltd.'s purchase of the Cargo.

The Banking Relationship between the Bank and Beaumont Ltd. and Beaumont Inc.

5. For several years prior to the 1986 shipment involved in this action, Beaumont Ltd. and Beaumont Inc. were customers of the Bank and used various credit facilities of the Bank, including loans and letters of credit, to finance the oil businesses of Beaumont Inc. and Beaumont Ltd. (Harrison Decl. ¶¶ 3-5; Harrison Dep. at 6).

6. In connection with obtaining such credit facilities from the Bank, both Beaumont Ltd. and Beaumont Inc. entered into a variety of credit and security agreements with the Bank. These agreements gave the Bank security interests and traditional secured-creditor rights in all of the assets of both companies. (Harrison Decl. ¶¶ 6-7 and Exhs. A-O). Both Beaumont companies also established accounts at the Bank to facilitate payments made on behalf of the companies to and by the Bank. (Harrison Decl. ¶¶ 4-5).

7. As a result of these credit and security agreements, when the transaction at issue in this case occurred, the Bank held valid security interests in all of Beaumont Ltd.'s and Beaumont Inc.'s assets. Furthermore, the assets of Beaumont Inc. had been pledged to the Bank to pay any claims the Bank had against Beaumont Ltd. (Harrison Decl. Exhs. E-L).

8. Every extension of credit by the Bank to Beaumont Ltd. or Beaumont Inc. was made at the Bank's option on a case-by-case basis, based upon the Bank's evaluation of such factors as the customer's overall creditworthiness, the nature of any collateral offered for the credit, and the nature of the credit itself. (Harrison Dep. at 9-12; Harrison Decl. Exhs. E-H).

9. Most extensions of credit by the Bank to the Beaumont companies took the form of letters of credit issued by the Bank for Beaumont. On average, the Beaumont companies requested two to three letters of credit each day from the Bank. (Harrison Dep. at 7-8).

Letter of Credit Financing

10. A letter of credit issued by the Bank is a loan made by the Bank to its customer (the "account party") for obligations the account party owes to another (the "beneficiary" of the letter of credit). The primary purpose of a letter of credit is to provide the beneficiary with prompt payment of the account party's obligation to the beneficiary upon presentation of specified documents to the Bank by the beneficiary. Letters of credit eliminate credit risks between beneficiaries and account parties, and thereby facilitate commercial transactions, particularly in international commerce, by giving the beneficiary a source of funds (*i.e.*, the Bank) that is known, accessible and impeccable instead of a source (*i.e.*, the account party) that may be less well-known and not so accessible. (Harrison Decl. ¶ 8).

11. The credit risk which the beneficiary would otherwise bear vis-a-vis the account party is, in a letter of credit transaction, transferred to the Bank. When the Bank issues a credit, the Bank has a firm, fixed obligation to pay the beneficiary upon the latter's compliance with the terms of the letter of credit. The Bank's proper payment of the credit to the beneficiary gives the Bank a right to reimbursement from the account party of the sum paid. Thus, an account party's request that the Bank issue a letter of credit involves the same general credit considerations and decisions as are involved in any application to the Bank for a loan. (Harrison Decl. ¶ 9).

12. All monetary transactions which the Bank undertook for Beaumont Ltd. and Beaumont Inc. were effected by debits and credits to the Beaumont accounts maintained at the Bank. Thus, for example, all payments of letters of credit issued by the Bank for Beaumont Ltd. or Beaumont Inc. in favor of their suppliers were debited to the appropriate Beaumont account at the Bank, and all funds received by the Bank for Beaumont Ltd. or Beaumont Inc. were credited to the appropriate Beaumont account at the Bank. These transactions were recorded by the Bank and reported to the Beau-

mont companies by, among other things, monthly account statements. (Harrison Decl. ¶ 10).

The Bank's Financing of Beaumont Ltd.'s Purchase of the cargo in this Case

13. In the Bank's dealings with Beaumont Ltd. and Inc., it was the customary practice for Beaumont Ltd. to purchase, outside the United States, a petroleum cargo which Beaumont Inc. then brought into the United States. This was done because Beaumont Inc. (but not Beaumont Ltd.) possessed the necessary licenses, etc., required to import petroleum cargoes into the United States. (Harrison Decl. ¶ 11).

14. As a result, obligations of Beaumont Ltd. to the Bank (created, for example, when the Bank issued and paid a letter of credit opened for the account of Beaumont Ltd.) were often paid with funds received at the Bank for Beaumont Inc.'s account. Beaumont Inc. had specifically agreed that it was liable for all of the Bank's claims against Beaumont Ltd. and that funds deposited in Beaumont Inc.'s account secured, and could be used to pay, any claim the Bank had against Beaumont Ltd. (Harrison Decl. ¶ 12 and Exhs. A, K and O).

15. On May 22, 1986 Beaumont Inc. sent a telex to the Bank requesting the Bank to issue a letter of credit for approximately $5.2 million to Corpoven, the state-owned oil company of Venezuela, for the account of Beaumont Ltd. to finance Beaumont Ltd.'s purchase of approximately 240,000 barrels of unleaded gasoline (the "Cargo"). (Harrison Dep., Exh. 2). Beaumont Inc. also included in its telex the exact language to be used by the Bank in issuing the letter of credit, and Beaumont Inc. specified the documents which Corpoven would have to present to the Bank to obtain payment under the letter of credit. One such document, as specified by Beaumont Inc., was a bill of lading "issued to the order of Banque Paribas (Suisse) S.A., Geneva notify Beaumont Oil, Inc. Houston, Texas, showing as destination New York harbor." (*Id.*) It is customary in the financing of oil

transactions to so reference banks in the bills of lading for the purposes of protecting the bank's security interest in the cargo. (Harrison Dep. at 22). In its telex, Beaumont Inc. also pledged the Cargo, and the proceeds of its eventual sale, to the Bank as collateral to secure the Bank's extension of credit in issuing the letter of credit. (Harrison Dep., Exh. 2).

16. In evaluating this request for credit, the Bank noted that the Cargo had not been sold by Beaumont Ltd. as of May 22, 1986, a fact that was extremely significant to the Bank because it meant the amount of money to be realized upon the eventual sale of the Cargo had not yet been fixed and would fluctuate up or down over time depending upon the re-sale market relating to the Cargo. (Harrison Dep. at 31-32 and Exhs. 4 and 4A). Because those proceeds of sale were part of the Bank's collateral on this financing, and would in the normal course ultimately be paid to Beaumont Ltd.'s account at the Bank to reimburse the Bank for its $5.2 million payment to Corpoven under the letter of credit, the Bank knew that the risk involved in financing this transaction was that the market value of the Cargo could decrease below the amount of the letter of credit prior to the sale of the Cargo. (Harrison Dep. at 34-35; Harrison Decl. ¶¶ 11-12). The Bank had, however, required Beaumont Ltd. and Beaumont Inc. always to keep the Bank in a fully-secured position. (*E.g.*, Harrison Decl. Exhs. E-H, K and L). Therefore, Beaumont Inc. placed a substantial cash deposit with the Bank as additional collateral for extensions of credit made by the Bank to the Beaumont companies. (Harrison Dep. 146-47).

17. Because the Cargo was destined for New York Harbor, the Bank knew, based on its prior experiences with the Beaumont companies, that Beaumont Ltd. would likely effect a transfer of the Cargo from Beaumont Ltd. to Beaumont Inc. (Harrison Declaration ¶ 11). This meant that the proceeds of the sale of the Cargo after it was imported into the United States would initially be remitted to the account of Beaumont Inc. at the Bank. (Harrison Decl. ¶¶ 10, 12). As noted, this was the normal procedure used by Beaumont Ltd. and Beau-

mont Inc. with respect to foreign cargoes destined for sale in the United States, and the Bank had obtained Beaumont Inc.'s guarantee to pay, from the assets of Beaumont Inc., all the debts of Beaumont Ltd. to the Bank. (Harrison Decl. ¶ 12 and Exhs. A, K and 0).

18. On May 23, 1986 the Bank issued the documentary letter of credit that Beaumont Inc. had requested the previous day. (Harrison Dep., Exh. 3). This letter of credit was for the account of Beaumont Ltd. in favor of Corpoven for approximately $5.2 million to finance Beaumont Ltd.'s purchase from Corpoven of the Cargo. (*Id.*)

Beaumont Ltd.'s and Beaumont Inc.'s Arrangements to Ship the Cargo from Venezuela to the United States

19. On or about May 20, 1986, Beaumont Ltd. began negotiating with Torm for shipment of the Cargo from Venezuela to the United States. (Kjaerulff Dep. at 14-17). At that time, Torm had a ship (the "TORM ROTNA") in position for this particular movement, and Torm agreed to ship the Cargo for Beaumont Ltd. (Kjaerulff Dep. at 18-19). The contractual arrangements between Torm and Beaumont Ltd. were summarized in a "fixture recapitulation" (Kjaerulff Dep., Exh. 3), and Torm and Beaumont Ltd. also entered into a formal transportation agreement, the Tanker Voyage Charter Party (the "Charter Party"). (Lazare Decl., Exh. A; Kjaerulff Dep., Exh. 4; Beeckman Decl., ¶ 4 and Exh. A). The Charter Party obligated Beaumont Ltd. to pay Torm the freight and related transportation charges for Torm's carriage of the Cargo from Venezuela to the United States. (Lazare Decl., Exh. A, Part II, Clause 2; Harrison Dep., Exh. 42).

20. Beaumont Ltd. and Beaumont Inc. were, in May 1986, well known to Torm because Torm had previously shipped cargoes for them. (Kjaerulff Dep. at 22-23). In deciding whether to enter into the Charter Party involved in this case, Torm "most definitely" considered the ability of Beaumont Ltd. to pay the freight charges to Torm, and Torm looked to

Beaumont Ltd. to pay the freight. (Kjaerulff Dep. at 21, 23). Torm knew that Torm's freight charges were to be paid "according to what is agreed in the Charter Party." (Kjaerulff Dep. at 25).

21. On or about May 25, 1986, the Cargo was loaded onto the TORM ROTNA, and on May 26, 1986, the ship's master signed bills of lading relating to the Cargo. The bills of lading were on Corpoven's standard bill of lading form (Lazare Decl., Exh. B), and Corpoven was interested in being sure that the bills of lading strictly complied with the terms of the letter of credit the Bank had issued to Corpoven on May 23, 1986. Accordingly, the bills of lading were issued "[t]o the order of Banque Paribas (Suisse) S.A. Geneva notify Beaumont Oil, Inc. Houston, Texas", and they showed New York harbor as destination for the Cargo. (Kjaerulff Dep., Exh. 6). Unlike the Charter Party, the bill of lading contained no provision concerning who was to pay the freight and related transportation charges to Torm. (*Id.*) Although the bill of lading in this case did not act as a contract of carriage, it did act as both a negotiable instrument and a receipt for the goods.

22. On or about May 27, 1986, the TORM ROTNA left Venezuela and proceeded to New York harbor. During the period of time the Cargo was aboard the TORM ROTNA and in transit, Beaumont Ltd. and Beaumont Inc.—but not the Bank—directed Torm in the movement of the Cargo. (Kjaerulff Dep. 59-63 and Exhs. 7, 9, 12-15, 17-19, 21-22). For example, on or about May 23, 1986, Torm received a telex stating that "chrs [*i.e.*, charterers, meaning Beaumont Ltd.] advise upon completion loading . . . vessel is to proceed New York for orders." (Kjaerulff Dep. at 55 and Exh. 7). Several days out of Venezuela, Beaumont Ltd. and Beaumont Inc. re-routed the direction of the ship and instructed the ship to proceed through the Panama Canal and toward the West Coast of the United States. (Kjaerulff Dep. at 61-62, 66-67 and Exhs. 9, 11-19). Torm's testimony is that "the charterers [meaning Beaumont Ltd.] . . . wished to stop the vessel, and sent the vessel in other [sic] direction" (Kjaerulff

Dep. at 55, 59-60) and that "the charterers . . . have an option to do as many stops as they want and redirect the vessel as many times as they want, . . ." (Kjaerulff Dep. at 63). The Bank learned of these stops and re-routings some days later and did not take part in any decision relating to the ship's movements. (Harrison Dep. at 28, 48). Indeed, Torm's witness testified he "could only guess" as to any facts indicating that the Bank had ordered Torm to re-route the ship. (Kjaerulff Dep. at 122). Beaumont Ltd. re-routed the ship because the Beaumont companies had been trying to sell the Cargo and concluded that the market for the Cargo was better on the West Coast of the United States than on the East Coast. (Kjaerulff Dep. at 59-60; Harrison Dep. at 53).

23. After the initial re-routing of the ship, Beaumont Ltd. continued to revise the TORM ROTNA's voyage orders in line with Beaumont Ltd.'s continuing efforts to sell the Cargo. Thus, on or about May 29, 1986, "*charterers* [*i.e.*, Beaumont Ltd.] instruct[ed] vessel to stop proceeding Los Angeles via Panama and drift." (Kjaerulff Dep. at 61 and Exhs. 9 and 13, emphasis added). On May 30, Torm received a telex stating that "*charterers* confirm vessel to proceed to Los Angeles for orders." (Kjaerulff Dep. at 69 and Exh. 12, emphasis added). On June 2, 1986, Torm acknowledged in a telex to its shipping agent that "in accordance with *charterer's* instructions vessel stopped again. . . . awaiting *charterer's* further discharge orders." (Kjaerulff Dep. at 74 and Exh. 14, emphasis added). On the same day, Torm received notice that the vessel was "ordered by *chtrs* to resume voy-[age] . . . towards Panama Canal." (Kjaerulff Dep. at 75 and Exh. 15, emphasis added). On June 3, 1986, Torm acknowledged that "*charterers* have now instructed vessel to proceed to Portland to discharge the cargo." (Kjaerulff Dep. at 82-83, and Exh. 18, emphasis added). According to Torm, "Portland was appointed port of discharge carriage *by the charterers*." (Kjaerulff Dep. at 83, emphasis added).

24. Throughout the TORM ROTNA's voyage, Torm consistently reminded Beaumont Ltd. of its obligation to pay Torm's freight charges to Torm. (Kjaerulff Dep. at 95-96).

25. The TORM ROTNA arrived at Portland, Oregon on or about June 18, 1986 with the Cargo on board. (Kjaerulff Dep. at 94).

Torm's Delivery of the Cargo to Beaumont Inc.

26. When the TORM ROTNA arrived at Portland, Oregon, Beaumont Inc. did not have the original bills of lading to present to the ship to permit off-loading of the Cargo. Such a circumstance is not unusual (Harrison Decl. ¶ 14), and, in fact, the Charter Party between Torm and Beaumont Ltd. had specifically provided for the contingency. Article 15 of the Charter Party, entitled "Bill of Lading Clause", provided:

> Owner [Torm] agrees to discharge all cargo at a facility or facilities designated by Charterer [Beaumont Ltd.] without presentation of Original Bill(s) of Lading. Charterer agrees to issue a telexed Letter of Indemnity holding Owner harmless against all consequences arising out of discharging without presentation of Original Bill(s) of Lading if requested by Owner. [Sentence deleted by Torm and Beaumont Ltd.] Letter of Indemnity for both change of destination and/or non-production of Original Bill(s) of Lading shall be as per Owner's P and I Club wording and shall be signed by an authorized officer of Beaumont Oil Inc.

(Kjaerulff Dep., Exhibit 4, ¶ 15; Lazare Decl., Exhibit A ¶ 15). The testimony of both the Bank and, significantly, Torm is that such a Letter of Indemnity does not relate to the payment of freight and transportation charges, but is simply to indemnify the carrier against losses directly resulting from discharging a cargo to someone who does not hold the original bills of lading. (Harrison Dep. at 24, 61-62; Kjaerulff Dep. at 27-28).

27. Torm exercised its right to request a Letter of Indemnity in place of the original bills of lading, and Torm pro-

vided the exact wording to be used in the Letter of Indemnity. (Kjaerulff Dep., Exhs. 8, 19, and 21).

28. By a telex dated June 18, 1986, Beaumont Inc. issued a Letter of Indemnity to Torm, using the exact language Torm had required. The Letter of Indemnity was "joined in" by the Bank, which was also in accordance with the language and instructions established by Torm's P and I underwriters. (Kjaerulff Dep., Exhs. 1 and 8).

29. With Beaumont Inc.'s Letter of Indemnity in hand, Torm discharged the Cargo from the TORM ROTNA, beginning on June 18, 1989. Torm's own language, used in the Letter of Indemnity, confirms that, upon such discharge, Torm delivered the Cargo to Beaumont Inc. (Kjaerulff Dep., Exh. 1, opening sentence). At no time did the Bank ever take delivery of the Cargo. (Harrison Dep. at 93).

30. The Cargo was delivered to Beaumont Inc. by pumping it into storage tanks in Portland, Oregon owned by a company called Time Oil Company ("Time"), a company that was previously unknown to the Bank. (Harrison Dep. at 51). Beaumont Inc. had, on June 13, 1986, entered into a Storage and License Agreement (the "Storage Agreement") with Time and Senco Marketing ("Senco") for the temporary storage of the Cargo while Beaumont Inc. proceeded to sell it. (Lazare Decl., Exh. C). In that Storage Agreement, Beaumont Inc. and Senco jointly covenanted that they were "the sole legal and beneficial owner" of the Cargo. (*Id.*, ¶ 1.1). The Storage Agreement also explicitly recognized the Bank's secured status with respect to the Cargo; the Agreement recited that the Cargo was "free from all liens and encumbrances except Banque Paribas (Suisse) S.A. Geneva." (*Id.*).

31. Torm made the fatal and conscious decision to discharge the Cargo to Beaumont Inc. without first getting its freight charges paid, thereby voluntarily assuming the credit risk that Beaumont Ltd. and Beaumont Inc. would not pay, or would not be able to pay, Torm for those charges. (Kjaerulff Dep. at 105-106 and Exhs. 25-28). Torm's witness testified:

> [I]t is common practice that you release a cargo before freight is paid.

(*Id.*) But this custom and practice in the tanker industry did not change the fact that the Charter Party gave Torm the right to require payment of freight upon delivery. Thus, Torm's action in discharging the Cargo without first obtaining payment of the freight charge constituted a voluntary and irrevocable waiver of the possessory lien Torm had on the Cargo for the payment of freight.

32. There is no evidence that Torm sought payment of the freight from, or even communicated with, the Bank prior to the discharge of the Cargo. (Kjaerulff Dep. at 99).

33. Torm was not immediately concerned about the failure to be paid its freight charges even after discharge of the Cargo. Torm's witness testified that freight payments "can be delayed for many reasons" and that "we usually give them and I think in this case too we gave them daily reminders that we have not received the freight . . ." (Kjaerulff Dep. at 96).

34. Thereafter, Torm sent more demands to Beaumont Ltd. for payment of the freight charges. For example, on July 3, 1986, Torm's counsel in this case sent a telex to Beaumont Ltd. which stated, in part:

> We are advised that *you* have not paid freight due. . . . *Your* failure to remit those sums is a clear and flagrant breach of the charter, in particular *your* undertaking to pay freight "without discount" upon completion of discharge.

(Kjaerulff Dep., Exh. 29, emphasis added).

35. Once the Cargo arrived within the jurisdiction of the United States, the Bank filed financing statements, pursuant to the Uniform Commercial Code, in Oregon to perfect the Bank's security interest in the Cargo and its proceeds. (Harrison Dep. at 63 and Exh. P).

36. Upon receipt of Beaumont Inc.'s Cargo into its storage tanks, Time telexed a warehouse receipt, in the name of the Bank, to the Bank. (Harrison Dep., Exh. 27). The warehouse receipt specifically incorporated the terms of the Storage Agreement (*id.* at 3), and the warehouse receipt was issued in order for the Bank to continue its perfected security interest in the Cargo and the proceeds of its sale. (Harrison Dep. at 63). Such action was in conformity with the Bank's long-standing security agreements with both Beaumont Inc. and Beaumont Ltd. which provided, among other things, that Beaumont Inc. and Beaumont Ltd. granted the Bank a lien on all goods which the Beaumont companies have or might deposit anywhere in the world, whether the goods are represented by warehouse receipts, bills of lading, or any other documentary evidence of their existence. (Harrison Dep. at 66). The Beaumont companies also permitted the Bank to store such goods at any other place the Bank shall deem appropriate, and such collateral shall specifically secure all present or future claims of the Bank against the Beaumont companies arising from their business relations. (Beaumont Inc.'s Pledge of Goods as Collateral; Harrison Decl., Exhs. K and L). The Bank had no authority to veto Beaumont Ltd.'s or Beaumont Inc.'s decisions regarding discharge and storage of the Cargo:

> I do not believe [the Bank] can actually refuse to discharge a cargo, should the charterer instruct the master and the master go ahead and follow the charterer's instructions.
>
> . . .
>
> Again, should Beaumont really want to discharge this cargo and convenience the ship owner, I do not think the bank can veto anything. . . . [T]here is no real authorization the bank can give.

(Harrison Dep. at 71). Nor did the Beaumont companies need permission from the Bank to put lead into the Cargo. (Harrison Dep. at 100).

Sale of Beaumont Inc.'s Cargo and
Repayment of Beaumont Ltd.'s Debt

37. From June 1986 through July 11, 1986, Beaumont Inc. conducted sales of the Cargo in varying-sized lots to several different purchasers. For each such sale, Beaumont Inc. instructed the Bank to release its security interest and lien pursuant to the Pledge of Goods as Collateral in the appropriate amount of Cargo being sold. The Bank did so, and the proceeds of the sales were sent to Beaumont Inc.'s account at the Bank where they were credited against the debt created on June 26, 1986 when the Bank paid the letter of credit it issued on May 23, 1986 to Corpoven for Beaumont Ltd.'s initial purchase of the Cargo. (Harrison Dep. at 90-91, 95-96, 105, 107, 112-114, 123-24 and Exh. 35). Although the Bank acted to release its security interest when portions of the Cargo were sold and upon Beaumont Inc.'s requests (Harrison Dep. at 86), there is no evidence that the Bank participated in Beaumont Inc.'s sales decisions. Nor did the Bank receive any profits from the sales. In fact, the proceeds of the sales were insufficient, by approximately $800,000 to $900,000, to cover Beaumont Ltd.'s outstanding debt to the Bank on this transaction. (Harrison Dep. at 131, 141).

Termination of the Letter of Indemnity

38. Beaumont Inc.'s Letter of Indemnity stated, in accordance with the language provided by Torm:

> [T]his indemnity and any underlying liability shall automatically cease upon presentation to owners [Torm] or their appointed representatives of the full sets of original bills of lading.

(Kjaerulff Dep., Exh. 1, ¶ 9).

39. On July 14, 1986, Torm received the full sets of the original bills of lading relating to the Cargo. (Kjaerulff Dep. at 49; Lazare Decl., Exh. D).

Beaumont Ltd.'s Failure to Pay Freight Charges

40. Neither Beaumont Ltd. nor Beaumont Inc. paid to Torm the freight and related transportation charges, as neither company had the financial ability to do so. (Kjaerulff Dep. at 95-96, Exhs. 25-29; Harrison Dep., Exh. 53). Beaumont Inc. went into involuntary bankruptcy and liquidation commencing in September 1986. (Lazare Decl., Exh. F). Torm now pursues the Bank for the freight charges as a solvent party and the deep pocket.

CONCLUSIONS OF LAW OMITTED FROM APPENDIX.

§ 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in

parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchase acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to this rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Subsidiaries of Petitioner

Petitioner A/S Dampskibsselskabet Torm is a publicly owned, Danish corporation. It has no parent. In addition to its wholly-owned subsidiaries, Petitioner has less than 100% interest in the following foreign companies:

DanTankers I/S
K/S TORM Wind Tankers
Wind Success K/S
Baden Shipping Limited
Skagerak Tankers L.P.